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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 97.

BROOKE MACKALL, APPELLANT,

vs.

GEORGE W. CASILEAR ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 6, 1887.

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1 *Original Bill and Exhibits. Filed June* 1, 1885.

Bill of Complaint. Filed June 1, 1885. R. J. Meigs, Clerk.

Supreme Court of the District of Columbia.

BROOKE MACKALL, Jr.,
vs.
GEORGE W. CASILEAR & JANE CASILEAR, His Wife; Leonard Mackall & Rosalie Mackall, His Wife; Don Barton Mackall, Benjamin Mackall, Louise Owens & Thomas Owens, Her Husband; Catherine Christy & Robert Christy, Her Husband; Edmund Brand & Mary E. Keller.
} Equity. No. 9470.

The complainant, Brooke Mackall, Jr., brings this his bill against the above-named defendants, and says:

1st.

He is a citizen of the United States and a resident of the District of Columbia.

The defendants are all citizens and residents of the District of Columbia except Benjamin Mackall, who resides at ———.

Leonard Mackall, Don Barton Mackall, and Benjamin Mackall are brothers of complainant, and Louise Owens and Catherine 2 Christy are his sisters—all being the sole surviving children of Brooke Mackall, Sr., and Martha Mackall, his wife, both of whom are now deceased; the said Rosalie Mackall being the wife of Leonard Mackall; Thomas Owens being the husband of Louise Owens, and Robert Christy being the husband of Catherine Christy.

The said Edmund Brand and Mary E. Keller are residents of the District of Columbia, and are the sole surviving children and heirs of Louis Brand, hereinafter described as trustee in a certain deed of trust, a subject of controversy in this suit.

2nd.

On or about December 21st, 1863, complainant became the owner in fee simple, through a conveyance to him from Charles W. Pairo, George Randolph, executor of Jasper Cole, and Brooke Mackall, Sr., they having the power and authority to convey such fee simple estate, of a considerable number of lots in the city of Washington, D. C., described therein as follows:

Square No. 5, lot No. 2.
" " 17, " " 3 & 7.
" " 31, " " 3.
" " 41, " " 15.
" " 42, " " 2.
3 Square No. 43, lot No. 5.
" " 56, " " 12.

Square No. 62, lot No. 10.
" " 76, " " 13, 14, 17.

Said conveyance is on record in Liber R. M. H. No. 7, at folios 75, &c., in the land records of the District of Columbia, and a copy thereof is herewith filed as "Exhibit A."

3d.

Complainant further says that on or about the 5th day of May, 1866, he executed two promissory notes to the order of Brooke Mackall, Sr., dated that day and by the terms thereof due in thirty days, with interest from such date—one for three hundred and fifty dollars and the other for two hundred and forty-six & $\frac{58}{100}$ dollars—and also executed a deed of trust purporting to secure the payment thereof to said Brooke Mackall, Sr., as trustee, the same being acknowledged before said Brooke Mackall, Sr., as notary public, upon the following described of the said lots owned by him through the conveyance described in paragraph 2 of this bill, to wit:

Square No. 5, lot No. 2;
" " 56, " " 12, two parts thereof;
" " 76, " " 14, 17, & part lot 13,

4 more fully described in said deed of trust, a copy of which is annexed as "Exhibit B," the same being recorded June 5th, 1867.

Complainant says that in truth and in fact there was no consideration for the said notes, but they were made for the accommodation of said Brooke Mackall, Sr., and in order that they might be used for the purpose of borrowing money thereon for the benefit of said Brooke Mackall, Sr., as much as for the benefit of complainant; but no money was ever borrowed thereupon, and it was not intended that any claim should ever be set up against the complainant upon said notes or either of them, and there was no default of payment of the same.

About seven years thereafter, a variance occurring between complainant and his father, and his father having possession of said notes, he, without the consent or knowledge of complainant, advertised the said property, except one subdivision of lots 13 & 14, in square 76, known as subdivision A thereof, which in the meantime had been otherwise disposed of by complainant.

A copy of said advertisement is filed herewith as "Exhibit C." Said advertisement was published only on three successive days, the 12th, 13th, and 14th days of June, 1873, as shown
5 upon the face thereof, the first insertion being on the 12th day of June and the sale to be made on the 14th day of June, while according to the requirements of said deed of trust such publication should have been sixty days. The said sale was intended to be kept concealed from the complainant. It was not held upon the premises, but at the rooms of the auctioneers, and there were in fact no bidders present at such sale, but, at the instance of said B. Mackall, Sr., it was struck off nominally to one Joseph B. Hill, but really for the benefit of said B. Mackall, Sr., himself, no money whatever being paid by said Hill, and his name was used only to present

the appearance of such sale not being made by the trustee to himself, and that he might not appear to be a purchaser at his own sale. It was a scheme devised by said B. Mackall, Sr., to divest said complainant of his property and to obtain it himself without paying anything whatever for it. In pursuance of such scheme a deed (filed as Exhibit "D") was executed by said B. Mackall, Sr., as trustee, to said Joseph B. Hill for the nominal sum of $2,000, but in reality no money was paid therefor either by said Hill to said trustee nor by him or said trustee to complainant; and complainant
6 charges that by reason of the premises said deed to said J. B. Hill was void and of no effect, and that all subsequent conveyances depending thereupon are void and of no effect as to complainant.

4th.

Complainant further says that on or about March 13th, 1867, he executed a conveyance to Richard T. Morsell (filed herewith as "Exhibit E") in trust upon the following property, to wit:

Square No. 41, lot No. 15;
" " 43 " " 5

such conveyance being to secure the payment of $1,000 to said B. Mackall, Sr., stated to be due in one year from the date of such deed of trust. Said note was endorsed over to Clark Mills and wife, but the same was paid in full and is admitted to have been paid in full in a subsequent deed, to which said trustee and said Mills and wife are parties, referred to in the next paragraph of this bill.

5th.

Complainant further says that on or about July 14th, 1868, a deed was executed (filed herewith as "Exhibit F") by said Richard T. Morsell, of the first part, Clark Mills and wife, of the second part, complainant, of the third part, and one Louis Brand, of the fourth part, reciting the deed described in the fourth paragraph of this bill ("Exhibit E"), the transfer of said note of
7 $1,000 mentioned therein to the said Clark Mills and wife, and the payment thereof to them by complainant, and reciting also an indebtedness of complainant to Brooke Mackall, Sr., of $2,000, payable six months after the date thereof, and conveying the said property described in "Exhibit F," to wit:

Square No. 41, lot. No. 15;
" " 43, " " 5,

in trust to said Louis Brand, as trustee, to secure the payment of the said indebtedness so recited of $2,000 to Brooke Mackall, Sr.; but complainant says that in truth and in fact said note of $2,000 was also an accommodation note and made to raise money upon for the common benefit of both parties; but no such money was ever raised, and there was no consideration for said note.

6th.

Complainant further says that about five years thereafter, there then occurring a variance between his father and himself, as stated

in the third paragraph to this bill, in pursuance of a similar scheme to obtain the property of complainant to himself, as heretofore alleged in regard to the property held by himself as trustee,
8 said B. Mackall, Sr., procured the said Louis Brand to advertise the said property for sale, as shown by copy of advertisement, herewith filed as "Exhibit G."

Said advertisement, instead of having been published three weeks, as the deed of trust prescribed, was published only for the period of three days, commencing May 23d, 1873, and was advertised only four times, the sale being made May 26th, 1873. It was done without the consent or knowledge of complainant and without any written request, as prescribed, and the place of sale was at the private rooms of the auctioneers. There were no bidders at the sale; but, at the instance of said B. Mackall, Sr., the following property, part of the said property contained in said deed of trust, to wit, square 41, lot 15, Nos. 2, 3, 4, 5, subdivisions of lot 5, in square 43, was struck off to said Joseph B. Hill at the nominal sum of $2,000, he, however, paying no money therefor whatever and it being well understood and agreed that the real purchaser was the said B. Mackall, Sr., and no payment or account thereof was ever made to the complainant; thereupon a conveyance was prepared by said B. Mackall, Sr., in his handwriting, and was executed by said Louis Brand, trustee, to said Joseph B. Hill, a copy of which is filed as "Exhibit H."

9 Complainant charges that the said sale and the said deed in pursuance thereof were inoperative, null, and void, and conveyed no title to said Joseph B. Hill, and all subsequent conveyances resting thereupon are by reason of such invalidity inoperative, null, and void as to this complainant.

7th.

Complainant further says that six days after the date of the deed mentioned in paragraph 6 the said Joseph B. Hill executed a conveyance, copy of which is filed herewith as "Exhibit I," dated August 4th, 1873, of the following property, to wit:

Square 43, lot 5, subdivisions 2 & 3;
" 56, two parts of lot 12;
" 76, lot 17,

to John C. McKelden and Edward McB. Timoney, as trustees, to secure a note of $3,000 of said B. Mackall, Sr., to F. A. Casilear, due in one year from the date thereof. Said trustees and said F. A. Casilear had full knowledge at the time of the defects of title herein mentioned, both by the record and otherwise, and were not *bona fide* purchasers or creditors as to the said property mentioned in said conveyance (Exhibit "I").

8th.

10 In October, 1874, default having been made by the said B. Mackall, Sr., in the payment of his said note of $3,000 to said F. A. Casilear, the said trustees, McKelden and McB. Timoney, advertised the said property described in the deed of trust to them,

as appears in paragraph 7 of this bill, for sale; whereupon this complainant, at the day and place of sale so advertised, and before the sale, read a notice publicly and in the hearing of all the bidders present, of which copies are filed (as "Exhibit J"), and also then and there caused copies thereof to be served upon the following persons, to wit: E. McB. Timoney, J. C. McKelden, Wash. B. Williams, the auctioneer.

Notwithstanding this, however, said trustees proceeded to offer the said property for sale; whereupon the defendant, George W. Casilear, though knowing well the contents of the said notices ("Exhibit J") and of the defects of title herein described and the claims of complainant in relation thereto, as herein set forth, bid in the said property at $2,722.95, and thereupon a deed, dated Oct. 23d, 1874, was executed by said trustees, McKelden and McB. Timoney, of the said property, to wit, square 43, subdivisions 2 & 3 of lot 5; square 76, lot 17, and square 56, two parts of lot 12, more fully de-
11 scribed in said deed, copy of which is filed (as "Exhibit L").

9th.

On the 13th day of January, 1874, said Joseph B. Hill, describing himself as trustee and in his own right, and said Brooke Mackall, Sr., joined in a conveyance to the defendant, Leonard Mackall, as trustee, of the following property, among other, to wit:

Lot 15, in square 41;
Lots 2, 3, 4, 5, in subdivision of lot 5, square 43;
Lots 13, 14, & 17, in square 76;
And two parts of lot 12, in square 56,

more fully described in the said conveyance, a copy of which is filed herewith (as "Exhibit K"), said lots being the same hereinbefore referred to in the said deeds to the said Joseph B. Hill, and herein charged to be illegal, null, and void for the reasons before set forth.

Said deed ("Ex. K") is in trust for the use and benefit of said B. Mackall, Sr., and subject to his absolute control and disposal, as therein expressed

The said Brooke Mackall, Sr., departed this life Feb. 28th, 1880, and the said defendants herein named, as brothers and sisters of complainant, claim the said property so conveyed by the deed of Jan'y, 1874, to Leonard Mackall, as trustee, as heirs and
12 devisees of the said B. Mackall, Sr.

10th

The defendant, Geo. W. Casilear, now claims title to lot 17, in square 76, and the said two parts of lot 12, in square 56, as derived from the said deed of Brooke Mackall, Sr., trustee, to Joseph B. Hill, and to subdivisions 2 & 3 of lot 5, in square 43, as derived from the deed of Louis Brand, trustee, to Joseph B. Hill.

The other defendants, brothers and sisters of complainant, claim title to lots Nos. 13, 14, & 17, in square 76, and the said two parts of lot 12, in square 56, as derived from the deed of B. Mackall, Sr., to Joseph B. Hill, and lot No. 15, in square 41, and subdivisions 2, 3, 4, & 5, in square 43, as derived from the said deed of Louis Brand, trustee, to the said Joseph B. Hill, which are the two deeds charged to be null and void, but are a cloud upon the property described therein, the complainant, though not having the legal title thereto, being equitably entitled thereto, and to have such deeds, with all subsequent claims of title derived through the same, adjudged and decreed null and void and the cloud resting upon the title removed.

11th.

Complainant says that some of the reasons for the delay
13 which has occurred in his not before having filed a bill to set
aside the said conveyance are as follows:

As to Casilear, he at all times has protested against his claim, notifying him at the time of his purchase that he should not submit to the sale, and he has since then been engaged in negotiations from time to time with him, orally and by mutual correspondence in writing, which he has hoped would result in a settlement and adjustment of their differences in regard to the property held by him. He has received large amounts by way of rents and profits of said property and has made no substantial improvements thereon.

As to the remainder of such property, he says that soon after the execution of the deeds made in 1874 the said B. Mackall, Sr., became reconciled to complainant, they living together and sharing the benefit of all property possessed by each in common. He, said B. Mackall, Sr., constantly assured complainant that he would rectify all that was wrong in said conveyances to the best of his ability, which assurance was relied upon by complainant and was satisfactory to him.

Said B. Mackall, Sr., drew up forms of reconveyance to complain-
ant of such property or parts thereof, one of which he signed
14 and delivered to complainant, and which are now in posses-
sion of complainant.

In Feb'y, 1880, he did execute a reconveyance of all his interests in said property, which was entirely satisfactory to complainant, though such reconveyance was attacked by his said brothers and sisters, and a decree was made adjudging the same to be void as to the property herein claimed by complainant, from which decree, however, they claim to have taken an appeal to the Supreme Court of the United States, and which appeal they claim is now pending, though such claim is not admitted by complainant. While such litigation was pending, however, there was, as believed by complainant, no propriety in bringing suit to enforce what he claimed to have been sufficiently performed by the execution of said deed of his father's to him of Feb'y 28th, 1880, and such litigation was pending at a very recent date.

Prayers.

1st. The complainant prays process of this court against the defendants named that they may answer this bill under oath, and that
they abide by such decree as may be made in this suit.
15 2nd. That the two deeds herein described of B. Mackall,
trustee, and Louis Brand, trustee, to Joseph B. Hill be ad-

judged and decreed to be null and void and of no effect, and that all deeds, written instruments, and claims of title whatever derived through the same be adjudged and decreed to be null and void, and complainant be adjudged and decreed to be the owner of the property described therein, free and clear from all claims and demands of the said defendants or either of them, and to an account for their use and occupation of the same.

3d. That an account be taken of the rents, issues, and profits of said property in favor of complainant against such of said defendants as have occupied the said property or parts thereof.

4th. That complainant may have such other relief as may be just and equitable.

B. MACKALL, Jr.

W. WILLOUGHBY,
Sol. for Complainant.

15½ Exhibits to Bill of Complaint, A to L, Inclusive.

16 (Not subject to stamp duty. L. Clephane, collector of internal revenue. May 21st, '66.)

Exhibit A. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

This indenture, made this twenty-first day of December, in the year of our Lord eighteen hundred and sixty-three, between Charles W. Pairo, of the city of Baltimore, State of Maryland, of the first part; George Randolph, executor of Jasper Cope, late of the city of Philad'a, deceased, of the second part; Brooke Mackall, of the city of Washington, of the third part, and Brooke Mackall, Junior, of the same place, of the fourth part, witnesseth:

Whereas the said Brooke Mackall, being indebted to Jasper Cope by his deed of indenture made and executed, bearing date on or about the twentieth day of September, eighteen hundred & fifty-five, nuly recorded in Liber J. A. S. number 101, folios number- 384, 385, 386, and 387, one of the land records for Washington county, in the District of Columbia, did grant and convey to the said Charles W. Pairo and to his heirs and assigns all of lots of ground numbered two (2), in square numbered five (5); lots number- three (3)
17 and seven (7), in square number seventeen (17); lot number three (3), in square number thirty-one (31); lot number fifteen (15), in square number forty-one (41); lot number two (2), in square number forty-two (42); lot number five (5), in square number forty-three (43); lot number twelve (12), in square number fifty-six (56); lot number ten (10), in square number sixty-two (62); lots number- thirteen (13), fourteen (14), and seventeen (17), in square number seventy-six (76), the same being and laying in the city of Washington and District of Columbia, in trust for the purposes therein named, as by reference to the said deed of indenture will more fully — at large appear; and whereas, the said debt, with all interest and costs, *have* been fully paid and discharged to George Randolph, — has hereunto subscribed his name and affixed his

seal, and the purposes for which the said trust was created *have* therefore ceased and determined, the said Brooke Mackall is entitled in law to a reconveyance of the premises free and discharged of and from the trust as aforesaid and as fully as if the said deed had never been made;

And whereas the said Brooke Mackall has now requested that the said Charles W. Pairo *to* convey the said lots to Brooke Mackall, Junior;

18 Now, therefore, this indenture further witnesseth that, for and in consideration of the premises and of the sum of five dollars to him, the said Charles W. Pairo, in hand paid by the said Brooke Mackall, Junior, at and before the *re*sealing and delivery of these presents, the receipt whereof is hereby acknowledged, by the said Charles W. Pairo, hath sold, aliened, conveyed, released, enfeof-ed, and confirmed, and by these presents doth sell, alien, convey, release, enfeoff, and confirm, unto the said Brooke Mackall, Junior, and to his heirs and assigns all the above lots:

To have and to hold the said herein-described premises, with all the right and title of the said Charles W. Pairo thereto, under the aforesaid in part recited deed of trust & all the right and title of the said Jasper Cope unto him, the said Brooke Mackall, Junior, his heirs and assigns, to his and their only use and benefit and behoof forever.

In testimony whereof the said parties of the first, second, and third parts have hereunto set their hands and seals the day and year first herein written.

CHARLES W. PAIRO. [SEAL.]
GEORGE RANDOLPH. [SEAL.]
B. MACKALL. [SEAL.]

Witness to Charles W. Pairo:
GEO. DUMBOLTON.
Witness to George Randolph:
WILLIAM J. WILLIAMS.
19 Witness to Brooke Mackall:
A. JACKSON JONES.

STATE OF MARYLAND AND CITY OF BALTIMORE:

We, W. H. Hayward and Rich'd C. Murray, justices of the peace in and for said city and State, do hereby certify that Charles W. Pairo, trustee, party to a certain deed, bearing date December 21st, A. D. 1863, and hereto annexed, personally appeared before us in the aforesaid city, the said Charles W. Pairo being personally known to us as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under our hands and seals this 9th day of January, A. D. 1864.

W. H. HAYWARD, *J. P.*
R. C. MURRAY, *J. P.*

State of Maryland, }
Baltimore City, } *sct:*

Seal of Superior Court
of Baltimore City.

I hereby certify that W. H. Hayward and R. C. Murray, Esquires, before whom the annexed acknowledgment was made and who have thereto subscribed their names, were at the time of so doing justices of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned
20 and sworn.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this ninth day of January, A. D. 1864.

ALFORD MACE,
Clerk of the Superior Court of Baltimore City.

[U. S. int. rev., 5 cts. Jan. 9th, '64. A. M.]

Received for record 2nd November, 1865.
R. M. HALL, *Rec.*

Recorded November 2nd, 1865, in the land records of Washington Co., D. C., in Liber R. M. H. No. 7, folios 75, 76, and —.
R. M. HALL, *Recorder.*

Rec'd for record May 22, '66; recorded in Liber R. M. H. No. 16, folio 240, &c., land records for Washington Co., D. C.
R. M. HALL, *Rec.*

21 Exhibit B. Filed June 1, 1885. R. J. Meigs, Clerk.

Brooke Mackall, Jr., }
to } Trust. Recorded June 5th, 1867.
Brooke Mackall. }

This indenture, made this fifth day of May, in the year of our Lord one thousand eight hundred and sixty-six, by and between Brooke Mackall, Junior, of Washington city, in the District of Columbia, of the first part, and Brooke Mackall, of same place, of the second part, witnesseth:

Whereas the said party of the first part is justly indebted unto Brooke Mackall in the sum of five hundred and ninety-six $\frac{58}{100}$ dollars, for which amount he holds his promissory notes, bearing even date herewith, payable to the order of B. Mackall, one for three hundred and fifty dollars, the other for two hundred and forty-six $\frac{58}{100}$ dollars, *for* thirty days after date, with interest; and whereas the said party of the first part being desirous to secure the full and punctual payment of said notes and all interest, costs, and expenses that may accrue thereon according to the true intent and meaning of the aforesaid promissory notes: Now, therefore, this indenture witnesseth that the said party of the first part, in consideration of the premises and the sum of one dollar to him in hand paid
22 by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is

hereby acknowledged, hath given, granted, bargained and sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth give, grant, bargain and sell, alien, enfeoff, convey, and confirm, unto the said party of the second part, his heirs and assigns, the following lots of ground: Lot numbered two (2), in square five (5); lot- fourteen (14), seventeen (17), and part lot numbered thirteen (13), in square seventy-six (76); parts lot numbered twelve (12), in square fifty-six (56), being in the city of Washington, in the District of Columbia, together with all and singular the improvements, privileges, hereditaments, and appurtenances to the same belonging or in any manner appertaining; to have and to hold the same unto and to the use of the said party of the second part, his heirs and assigns forever, in trust, nevertheless, for the use and purpose following, and none other—that is to say, to suffer and permit the said party of the first part, his heirs and assigns, to have, hold, use, occupy, possess, and enjoy the said premises, with the appurtenances as aforesaid, and the rents, issues, and profits of the same, to take, receive, and apply to
his own use until some default or failure shall have been made in
23 the payment of the said debt due as aforesaid to the said Brooke
Mackall or in any part thereof or of any proper interest, costs, and charges thereon or which may accrue thereon, and upon any and every such default or failure being made in the payment as aforesaid the said party of the second part shall, at the request in writing of the said Brooke Mackall or the holder or holders of said notes, proceed to sell and dispose of the said premises as aforesaid, or so much thereof as he may deem necessary, at public sale, to the highest bidder, upon such terms and conditions as he, the said party of the second part, may deem most for the interest of all parties concerned in said sale, first giving sixty — notice of the time, place, and terms of sale by advertisement in some newspaper printed and published in the city of Washington, and such sale to repeat or postpone from time to time, as the said party of the second part may deem expedient, and out of the proceeds arising from such sale or sales (after paying the proper expenses thereof and other expenses of this trust, including five per centum on the gross amount of said sale or sales as compensation to said trustee for his trouble
and diligence in executing this trust) to pay, in the first place,
24 whatever of said debt, interests, costs, and expenses may be
due and unpaid at the time of such sale or sales; secondly, to pay whatever of said debt, interest, costs, and expenses may then remain unpaid, although the same may not then have become due and payable; and, lastly, the surplus, if any, to pay over to the said Brooke Mackall, Junior, his executors, administrators, or assigns; and, in the event of any such sale or sales under the provisions of this trust, to convey to the purchaser or purchasers, on his or their compliance with the terms of sale, all right, title, and estate, legal and equitable, of the said party of the first part in and to the premises sold, free from any liability for the application of the purchase-money.

In testimony whereof the said party of the first part has hereunto set his hand and affixed his seal the day and year first hereinbefore written.

B. MACKALL, Jr. [seal.]

Signed, sealed, and delivered in presence of—
LOUIS BRAND.
THOMAS BARRETT.

[50-cent stamp aff'd.]

District of Columbia,
County of Washington, } *To wit:*

I, Brooke Mackall, a notary public in and for the county of
25 Washington and District of Columbia, do hereby certify that
Brooke Mackall, Junior, party to a certain deed, bearing date on the fifth day of May, in the year of our Lord one thousand eight hundred and sixty-six, and hereto annexed, personally appeared before me in my county aforesaid, the said Brooke Mackall, Junior, being personally well known to me as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this fifth day of May, A. D. 1866.

B. MACKALL,
Notary Public.

(Seal aff'd.)

Exhibit C. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

By Kirby, Dent & Co., general auctioneers and commission merchants, Nos. 313 & 315, Ninth street, near Pennsylvania avenue.

By virtue of a deed of trust dated 5th May, 1866, and duly recorded in Liber E. C. E. No. 9, folio 125, &c., one of the land records of Washington county, in the District of Columbia, and by request of the parties, we will sell, at public auction, within our salesrooms, to the highest bidder, on the 14th of June next, at 1 o'clock
26 p. m., lots and parts of lot lying and being in the city of
Washington, D. C., and known as lots 13, 14, & 17, in square 76; also parts of lot 12, in square 56.

Terms of sale.—One-fourth cash; balance in three, six, and twelve months, bearing interest.

B. MACKALL, *Trustee.*
KERBY, DENT & CO., *Auct's.*

je12–3t*.

Exhibit D. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

This indenture, made this 26 day of June, in the year of our Lord eighteen hundred and seventy-three, between Brooke Mackall (the trustee appointed in and by a certain deed of trust hereinafter mentioned), as such trustee, of the one part, and Joseph B. Hill, of the other part.

Whereas a certain Brooke Mackall, Jun., being indebted to Brooke

Mackall, as specified in the deed of trust hereinafter mentioned,
did, on the fifth day of May, 1866, by his deed of that date, convey
to the said Brooke Mackall and his heirs all of lots of ground numbered (13) thirteen, (14) fourteen, and seventeen (17), in square (76)
seventy-six, and the following parts of lot No. (12) twelve, in
27 square (56) fifty-six, beginning at the southeast corner of
said lot, and running thence north along 22nd street west
thirty-four feet, thence west seventy-three feet two and one-half
inches, thence south thirty-four feet, thence east to the place of beginning; also another beginning on 22nd street west twenty feet
and nine inches south from the northeast corner of said lot, and
running thence south along said street eleven feet eight and three-quarters of an inch, and thence west one hundred and thirty-seven
feet two and one-half inches to the rear line of said lot, thence north
sixteen feet one and a quarter inches, thence east forty-four feet two
and one-half inches, and thence south four feet one and a quarter
inches, and thence east ninety-seven feet to the place of beginning,
the same being and laying in the city of Washington and District
of Columbia, which said deed is duly recorded in Liber E. C. E. No.
9, folio 125, &c., one of the land records of Washington county, in
the District of Columbia; and whereas since the execution of said
trust said lots No-. 13 & 14 have been subdivided into lots A, B, C,
D, E, F, G, H, I, K, L, M, N, & O, in square (76) seventy-six:

To have and to hold the premises to the said Brooke Mackall and
his heirs in trust for the purposes in said deed mentioned,
28 which will more fully and at large appear by reference thereto,
one of which purposes or declarations of trust was that the
said trustee should sell the said premises upon the terms and conditions and in the manner therein mentioned in case the said debt or
any part thereof should remain unpaid longer than the time in said
deed specified; and the said debts or a part thereof having remained
unpaid longer than said time specified, the said Brooke Mackall, at
the request of the parties, did, on the fourteenth day of June, 1873,
after having given public notice of the time and place and the terms
of sale in the "Chronicle," a newspaper published in the city of Washington, in the District of Columbia, *did* proceed to sell, according to
the conditions declared and the authority given him in and by said
deed of trust, all of said lots lettered B, C, D, E, F, G, H, I, K, L, M,
N, & O, in said subdivision of original lots No-. 13 & 14, and also all
of original lot No. 17, in square (76) seventy-six, and the following
parts of lot No. (12) twelve, in square (56) fifty-six, beginning at the
southeast corner of said lot and running thence north along 22nd
street west thirty-four feet, thence west seventy-three feet two and
one-half inches, thence south thirty-four feet, thence east to the
place of beginning; also another part beginning on 22nd street
29 west twenty feet and nine inches south from the northeast
corner of said lot and running thence south along said street
eleven feet eight and three-quarters of an inch and thence west one
hundred and thirty-seven feet two and one-half inches to the rear
line of said lot, thence north sixteen feet one and one-quarter inches,
thence east forty-four feet two and one-half inches, and thence south

four feet one and a quarter inches, and thence east ninety-seven feet to the place of beginning—the alley adjoining the next house north is the property of both houses—and sold the same to Joseph B. Hill at the sum of two thousand dollars, said sale being such an one as the trustee deemed most for the interest of all the parties concerned therein:

Now, therefore, this indenture witnesseth: That the said Brooke Mackall, as trustee as aforesaid by virtue of the authority given to him in said deed of trust from the said Brooke Mackall, Jun., and not otherwise, in consideration of the premises and of the aforesaid sum of two thousand dollars by the said Joseph B. Hill to him in hand paid or secured to be paid before the sealing and delivering of these presents, hath given, granted, bargained, and sold, assigned, transferred, and set over, and doth give, grant, bargain, and
30 sell, assign, transfer, set over, and convey, unto the said Joseph B. Hill and his heirs all the right, title, interest, and estate which the said Brooke Mackall, Jr., had in and to the premises last therein mentioned at the time of his executing his aforesaid deed of trust; to have and to hold the said premises and the said right, title, interest, and estate of the said Brooke Mackall, Jun., therein at the time of his executing his said deed of trust unto the said Joseph B. Hill, his heirs or assigns forever.

In testimony whereof the said Brooke Mackall, as trustee as aforesaid and not otherwise, hatn hereunto set his hand & seal the day and year first herein mentioned.

B. MACKALL, *Trustee.* [SEAL.]

Signed, sealed, & delivered in presence of—

J. D. SOUTHARD.

DISTRICT OF COLUMBIA,
County of Washington, } *To wit:*

I, Wm. Martin, a justice of the peace in and for the county & District aforesaid, do hereby certify that Brooke Mackall personally appeared before me, being personally well known to me as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and seal this 26 day of June, 1873.

WM. MARTIN, *J. P.* [SEAL.]

31 Rec'd for record July 2, '73, and recorded in Liber No. 721, folio 351, of the land records for the District of Columbia, being ex'd by—

S. WOLF, *Recorder.*

EXHIBIT E. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

Brooke Mackall, Jr.,
to
Richard T. Morsell. } Trust. Recorded March 30, 1867.

This indenture, made this thirteenth day of March, eighteen hundred and sixty-seven, between Brooke Mackall, Junior, of Washington city, in the District of Columbia, of the first part, and Richard T. Morsell, of the same place, of the second part.

Whereas said party of the first part is justly indebted to Brooke Mackall in the sum of one thousand dollars, for which amount the said Brooke Mackall holds the said Brooke Mackall, Junior's, promissory note bearing even date herewith and payable one year after date to the order of said Brooke Mackall, with interest from date; and whereas said party of the first part is desirous to secure the full and punctual payment of said debt and all interest, costs, and
32 expenses that may accrue thereon:

Now, therefore, this indenture witnesseth: That said party of the first part, for and in consideration of the premises and of the sum of one dollar to him in hand paid at and before the sealing and delivery hereof by said party of the second part, has granted, bargained, and sold, and by these presents does grant, bargain, and sell, alien, enfeoff, convey, and confirm, unto said party of the second part, his heirs and assigns, all the certain parcels of land situate in said city and known and distinguished on the plat or plan thereof as lot numbered fifteen (15), in square numbered forty-one (41), and lot numbered five (5), in square numbered forty-three (43), with the buildings, improvements, hereditaments, and appurtenances to the same belonging or in any manner appertaining; to have and to hold the same unto the said party of the second part, his heirs and assigns—

In trust, nevertheless, for the uses and purposes following and none other—that is to say, to permit said party of the first part, his heirs and assigns, to have, hold, use, occupy, possess, and enjoy said premises, with the appurtenances, and the rents, issues, and profits of the same to take, receive, and apply to his and
33 their own use until some default or failure shall have been
made in the payment of said debt or any part thereof or of any proper interest, costs, and charges thereon or which may accrue thereon, and upon any and every such defaults or failure being made in the payment as aforesaid said party of the second part shall, at the request in writing of any lawful holder or holders of said note, proceed to sell and dispose of the premises as aforesaid described, or so much thereof as he may deem necessary, at public sale, to the highest bidder, upon such terms and conditions as he, the said party of the second part, may deem most for the interest of all parties concerned in said sale, first giving three weeks' notice of the time, place, and terms of sale by advertisement in some newspaper printed and published in the city of Washington, and each

sale to repeat or postpone from time to time, as he may deem expedient, and out of the proceeds of such sale or sales, after paying the proper expenses thereof and other expenses of this trust, including five per centum on the gross amount of said proceeds as compensation to said trustee, to pay, in the first place, whatever of said debt, interest, costs, and expenses may then be due and unpaid; secondly, to pay whatever of said debt, interest, costs, and expenses
34 may then remain unpaid, although the same may not then
have become due and payable, and, lastly, the surplus, if any, to pay over to the said Brooke Mackall, Jr., his executors, administrators, or assigns; and in the event of any such sale or sales under the provisions of this trust to convey to the purchaser or purchasers, on his or their compliance with the terms of sale, all right, title, and estate, legal and equitable, of said party of the first part in and to the premises sold, free from any liability for the application of the purchase-money.

In testimony whereof said party of the first part has hereunto set his hand and affixed his seal the day and year first hereinbefore written.

B. MACKALL, JR. [SEAL.]

Signed, sealed, and delivered, being first duly stamped, in presence of—

JOHN CARROLL BRENT.

[$1 stamp aff'd.]

DISTRICT OF COLUMBIA,
Washington County, } *To wit:*

I, John Carroll Brent, a notary public in and for the county aforesaid, do hereby certify that Brooke Mackall, Junior, a party to a certain deed bearing date on the 30th day of March, A. D. 1867, and hereto annexed, personally appeared before me in my
35 county aforesaid, Brooke Mackall, Junior, being personally
well known to me as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and official seal this 30th day of March, A. D. 1867.

(Seal aff'd.)

JOHN CARROLL BRENT,
Notary Public.

EXHIBIT F. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

his indenture made this fourteenth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between Richard T. Morsell, of the first part; Clark Mills and Susan E. Mills, his wife, of the second part; Brooke Mackall, Jr., of the third part, and Louis Brand, of the fourth part, all of Washington city, in the District of Columbia.

Whereas said party of the third part, by his deed dated the 30th

day of March, A. D. 1867, recorded in Liber E. C. E. No. 1, fol. 322 *et seq.*, one of the land records of Washington county, in the District of Columbia, did grant and convey the hereinafter-described
36 property to said party of the first part, his heirs and assigns, in trust to secure a certain debt therein mentioned due to Brooke Mackall, for which he had passed to said Brooke Mackall his promissory note of even date with said deed, payable one year after date to the order of said Brooke Mackall, with interest, for $1,000; and whereas said Brooke Mackall has endorsed said note to said parties of the second part; and whereas said debt and all interest, costs, and expenses thereon have been fully paid to said parties of the second part, as is evidenced by their signing and sealing this deed, and said party of the third part is entitled to a reconveyance of said property; and whereas said party of the third part, being indebted to said Brooke Mackall in another sum of two thousand dollars, for which amount he has passed to him his promissory note of even date herewith, payable to the order of said Brooke Mackall six months after date, with interest from date, has requested said party of the first part to convey said property to said party of the fourth part in trust for the purposes hereinafter mentioned, as is evidenced by said party of the third part executing this deed:

Now, therefore, this indenture witnesseth: That said party of the first part, for and in consideration of the premises and of the
37 sum of one dollar to him in hand paid by said party of the fourth part at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, has granted, bargained, and sold, enfeoffed, conveyed, released, and confirmed, and by these presents does grant, bargain, and sell, enfeoff, convey, release, and confirm, unto said party of the fourth part, his heirs and assigns, all those certain parcels of land situate in said city and known and distinguished on the plat or plan thereof as lot numbered fifteen (15), in square numbered forty-one (41), and lot numbered five (5), in square numbered forty-three (43), with the appurtenances:

To have and to hold the same unto the said party of the fourth part, his heirs and assigns—

In trust for the use and purposes following and none other—that is to say, to permit said party of the third part, his heirs and assigns, to have, hold, use, occupy, possess, and enjoy said premises, with the appurtenances, and the rents, issues, and profits thereof to take, receive, and apply to his own use until some default or failure shall have been made in the payment of said debt of $2,000 or an[illegible] part thereof or of any proper interest, costs, and charg[illegible]
38 thereon or which may accrue thereon, and upon any an[illegible] every such default being made in the payment as aforesai[illegible] said party of the fourth part shall, at the request in writing of any lawful holder or holders of said note, proceed to sell and dispose of the premises, or so much thereof as he may deem necessary, at public sale, to the highest bidder, upon such terms and conditions as he, said party of the fourth part, may deem most for the interest of all parties concerned in said sale, first giving three weeks' notice of the

time, place, and terms of sale by advertisement in some newspaper printed and published in the city of Washington, and such sale to repeat or postpone from time to time, as he may deem expedient; and out of the proceeds of said sale or sales, after paying the proper expenses thereof and other expenses of this trust, including five per centum on the gross amount of said sale or sales as a compensation to said trustee, to pay, in the first place, whatever of said debt, interest, cost, and expenses may then be due and unpaid; secondly, to pay whatever of said debt, interest, cost, and expenses may then remain unpaid, although not then payable; and, lastly, the surplus, if any, to pay over to said party of the third part, his executors, administrators, or assigns; and, in case of any such sale or
39 sales under this trust, to convey to the purchaser or purchasers,
on his or their compliance with the terms of sale, all right, title, and estate, legal and equitable, of said party of the second part in and to the premises sold, free from any liability for the application of the purchase-money.

In testimony whereof said parties of the first, second, and third parts have hereunto severally set their hands and affixed their seals the day and year first hereinbefore written.

RICHARD T. MORSELL. [SEAL.]
B. MACKALL, JR. [SEAL.]
CLARK MILLS. [SEAL.]
SUSAN E. MILLS. [SEAL.]

Signed, sealed, & delivered—"the receipt of which is hereby acknowledged," line 13, p. 2, first interlined, & third line, 3, p. 4, written partly over an erasure—in presence of—
JOHN CARROLL BRENT,
As to the signature of Richard T. Morsell & B. Mackall, Jr.

DISTRICT OF COLUMBIA,
Washington County, } *To wit:*

I, John Carroll Brent, a notary public in and for the county aforesaid, do hereby certify that Richard T. Morsell & Brooke Mackall, Jr., parties to a certain deed bearing date on the fourteenth day of July, 1868, and hereto annexed, personally appeared before me, in my county aforesaid, the said Richard T. Morsell and Brooke Mackall, Jr., being personally well known to me as the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and official seal this 15th day of July, A. D. 1868.

JOHN CARROLL BRENT,
Notary Public.

Received 15 July, 1868; recorded in Liber No. 552, folio 475, of the land records of Washington Co., D. C.
Ex'd by—
W. G. HOW, *In. Ch.*

EXHIBIT G. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

By Kirby, Dent & Co., general auctioneers and commission merchants, Nos. 313 & 315 Ninth street, near Pennsylvania avenue.

By virtue of a deed of trust dated July 14th, 1868, and duly recorded in Liber No. 562, folio 475, one of the land records for Washington county, in the District of Columbia, and by request of the parties, we will sell at public auction, within our salesrooms, to the highest bidder, on Monday, the 26th day of May, 1873, at 10 o'clock *p.* m., lots lying and being in the city of Washington, D. C., and known as lot No. 5, in square 43, and lot No. 15, in square 41.

41 Terms of sale: One-half cash; balance in three and six months, bearing interest.

LOUIS BRAND, *Trustee.*
KIRBY, DENT & CO.,
Auctioneers, Nos. 313 & 315 *Ninth Street, Near Pennsylvania Avenue.*

My 23—4te.

EXHIBIT H. Filed June 1, 1885. R. J. Meigs, Clerk.

This indenture, made this 29th day of July, in the year of our Lord eighteen hundred and seventy-three, between Louis Brand (the trustee appointed in and by a certain deed of trust hereinafter mentioned), as such trustee, of the one part, and Joseph B. Hill, of the other part.

Whereas a certain Brooke Mackall, Jun., being indebted to Brooke Mackall as specified in the deed of trust hereinafter mentioned, did, on the 14th day of July, 1868, by his deed of that date, convey to the said Louis Brand and his heirs all of lots of ground numbered (15), fifteen, in square 41; also lots, Mackall's sub., No-. 2, 3, 4, & 5 of original lot No. 5, in square 43, the same being and laying in the
city of Washington and District of Columbia, which said
42 deed is duly recorded in Liber No. 562, folio 475, one of the
land records of Washington county, in the District of Columbia; to have and to hold the premises to the said Louis Brand and his heirs, in trust for the purposes in said deed mentioned (which will more fully and at large appear by reference thereto), one which purposes or declarations of trust was that the said trust should sell the said premises upon the terms and conditions and the manner therein mentioned in case the said debt or any pa thereof should remain unpaid longer than the said time specified the said Louis Brand, at the request of the parties, did, on the twenty-sixth day of May, 1873, after having given public notice of the time and place and the terms of sale in the "Chronicle," a newspaper published in the city of Washington, D. C., *did* proceed to sell, according to the conditions declared and the authority given him in

and by said deed of trust, all of said lots of ground numbered (15) fifteen, in square 41; also lots, Mackall's sub., No-. 2, 3, 4, & 5 of original lot No. (5) five, in square 43, and sold the same to Joseph B. Hill at the sum of two thousand dollars, said sale being such an one as the trustee deemed most for the interest of all the parties concerned therein:

43 Now, therefore, this indenture witnesseth: That the said Louis Brand, as trustee aforesaid, by virtue of the authority given to him in said deed of trust from the said Brooke Mackall, Jun., and not otherwise, in consideration of the premises and of the aforesaid sum of two thousand dollars by the said Joseph B. Hill to him in hand paid or secured to be paid before the sealing and delivery of these presents, hath given, granted, bargained, and sold, assigned, transferred, and set over, and doth give, grant, bargain, and sell, assign, transfer, set over, and convey, unto the said Joseph B. Hill and his heirs all the right, title, interest, and estate which the said Brooke Mackall, Jun., had in and to the premises last therein mentioned at the time of his executing his aforesaid deed of trust; to have and to hold the said premises and all the said right, title, interest, and estate of the said Brooke Mackall, Jun., therein at the time of his executing his said deed to trust unto the said Joseph B. Hill, his heirs and assigns forever.

In testimony whereof the said Louis Brand, as trustee as aforesaid and not otherwise, hath hereunto set his hand and seal the day and year first herein mentioned.

LOUIS BRAND, *Trustee.* [SEAL.]

Signed, sealed, & delivered in presence of—

JOS. T. K. PLANT.

44 DISTRICT OF COLUMBIA,
County of Washington, } *To wit:*

I, Jos. T. K. Plant, a justice of the peace in and for the District aforesaid, do hereby certify that Louis Brand, party to a certain deed bearing date on the 29th day of July, A. D. 1873, and hereto annexed, personally appeared before me, in my District aforesaid, being personally well known to me as the person who executed the above deed, and acknowledged the same to be his act and deed.

Given under my hand and official seal this 29th day of July, A. D. 1873.

JOS. T. K. PLANT, *J. P.* [SEAL.]

Rec'd for record July 28, 1873, and recorded in Liber No. 728, folio 43, of the land records for the District of Columbia, and ex'd by—

S. WOLF, *Recorder.*

EXHIBIT I.

Edward McB. Timoney, F street.

This indenture, made this fourth day of August, in the year of our Lord one thousand eight hundred and seventy-three, be-
45 tween Joseph B. Hill, of the city of Washington, in the District of Columbia, of the first part, and John C. McKelden and Edward McB. Timoney, of the said city of Washington, of the second part.

Whereas Brooke Mackall, of said city of Washington, is justly indebted unto one F. A. Casilear in the full sum of three thousand dollars, for which he hath passed to F. A. Casilear his promissory note, of even date with these presents, for said sum, payable in one year after date, with interest thereon from date until paid, at ten per cent. per annum, payable semi-annually, and the said party hereto of the first part being desirous to secure the punctual payment of said note when and as the same shall respectively become due and payable, with all interest and costs due and accruing thereon, he therefore executes these presents:

Now, therefore, this indenture witnesseth: That said party of the first part, for and in consideration of the premises and the sum of one dollar in lawful money of the United States to him in hand paid by the said parties of the second part at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed,
46 released, and conveyed, and doth by these presents grant,
bargain, sell, alien, enfeoff, release, and convey, unto the parties of the second part, their heirs and assigns, the following-described real estate, situate in the city of Washington, District of Columbia, to wit: Lots numbered two (2) and three (3) in Mackall's subdivision of original lot number five (5), in square number forty-three (43); also lot number seventeen (17), in square number seventy-six (76); also part of lot number twelve (12), in square number fifty-six (56), beginning for said part on 22d street west twenty feet nine inches (20 ft. 9 in.) south from the northeast corner of said lot and running thence south along said street eleven feet eight and three-quarter inches (11 ft. $8\frac{3}{4}$ in.); thence west one hundred and thirty-seven feet two and one-half inches (137 ft. $2\frac{1}{2}$ in.); thence north sixteen feet one and one-quarter inches (16 ft. $1\frac{1}{4}$ in.); thence east forty-four feet two and one-half inches (44 ft. $2\frac{1}{2}$ in.); thence south four feet one and one-quarter inch (4 ft. $1\frac{1}{4}$ in.), and thence east ninety-seven (97) feet to the beginning; also another part of said lot number twelve (12), in square number fifty-six (56), being the south part of said lot No. 12, fronting thirty-four (34) feet on said 22d street and running back with that width on and parallel
47 to the south line of said lot to the rear line of said lot, to-
gether with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging or in anywise appertaining, and all the estate, right, title, interest

and claim whatsoever, either at law or in equity, of the said party of the first part of, in, and to the said pieces or parcels of land and premises:

To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto and to the use of the said parties of the second part and the survivor of them, his heirs and assigns—

In and upon the trusts, nevertheless, hereinafter mentioned and declared, and none other—that is to say, in trust to permit the said party hereto of the first part, his heirs or assigns, to use and occupy the said described premises and the rents, issues, and profits thereof to take, have, and apply to and for his and their sole use and benefit until default be made in the payment of said promissory note or any instalment of interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same—

48 And upon the full payment of all of said note and the interest thereon and all other proper costs, charges, commissions, half commissions, and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said party hereto of the first part, his heirs or assigns, at his or their cost.

And upon this further trust, that upon default being made in the payment of the said promissory note, or any instalment of interest due thereon, or any proper cost, charge, commission, half commission, or expense in and about the same, then and at any time thereafter to sell the said pieces or parcels of land and premises at public auction, in front of the premises, after at least ten days' notice of the time, place, and terms of sale by advertisement in some one or more of the newspapers printed and published in the said city of Washington; which said terms of sale shall be as follows, viz: The amount of indebtedness secured by this deed of trust unpaid, with the expense of sale, in cash, and the balance at six and twelve months, for which the notes of the purchaser, bearing interest from the day of sale and secured by a deed of trust on the property sold, shall be taken. A deposit on each lot of one hundred dollars shall be required of the purchaser at the time of sale, and all conveyancing and

49 revenue stamps shall be at the expense of the purchaser.

And upon this further trust: upon full compliance with the terms of sale, to convey the property sold in fee simple to the purchaser or purchasers thereof, at his, her, or their cost and expense and without any liability to see to the application of the purchase-money, and out of the proceeds of said sale or sales, first, to pay all proper costs, charges, and expenses, and to retain as compensation a commission of five per cent. on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not, and, lastly, to pay the remainder, if any, to said party hereto of the first part, his heirs or assigns.

And the said party hereto of the first part doth hereby covenant with the said parties of the second part and their survivor, his heirs and assigns, that all taxes upon the said land shall be duly paid, and that the buildings on said parcel of land shall be kept insured

during the continuance of this trust in some good and responsible fire insurance company or companies, to the satisfaction of the parties of the second part, in the sum of three thousand dollars,
50 for the benefit of the debt hereinbefore described; and the
policy or policies of insurance be assigned to the said parties of the second part as trustees under these presents; and, further, that in case the said party hereto of the first part, his heirs or assigns, shall fail to pay taxes or to keep said property so insured, then the taxes may be paid and the property be insured for the amount aforesaid by the legal holder of the note before mentioned, and the amount of the taxes and premium paid shall be considered a part of the expense of said note secured hereby, in default of payment of which the said parties of the second part shall have power to sell said property hereby conveyed as aforesaid, and shall dispose of the proceeds of sale as hereinbefore provided.

And it is further agreed that if the property shall be advertised for sale under the provisions of the deed and not sold, then the said trustee shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof the said party of the first part hath hereunto set his hand and seal on the day and year first hereinbefore written.

JOSEPH B. HILL. [L. S.]
B. MACKALL. [L. S.]

51 Signed, sealed, and delivered in the presence of—
WM. MARTIN.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

I, William Martin, a justice of the peace in and for the county aforesaid, do hereby certify that Joseph B. Hill, party to a certain deed bearing date on the fourth day of August, A. D. 1873, and hereto annexed, personally appeared before me, in the county aforesaid, the said Joseph B. Hill, being personally known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and my seal this fourth day of August, A. D. 1873.

WM. MARTIN, *J. P.* [SEAL.]

Received for record on the 6 day of Aug., A. D. 1873, and recorded in Liber No. 728, folio 73, one of the land records for the District of Columbia, and examined by—

S. WOLF, *Recorder.*

51½ EXHIBIT J.

WASHINGTON, D. C., *October* 23*d*, 1874.

To E. B. McTimoney, J. C. McKelden, trustees, and Wash. B. Williams, auctioneer:

GENTLEMEN: You and each of you are hereby notified that you have no lawful authority to sell the premises or any part thereof advertised by you to be sold on this day, October 23d, 1874, to wit, the property described in a certain deed of trust dated August 4th, 1873, and recorded in Liber 728, folio 73, one of the land records for Washington county, in the District of Columbia.

And you are further notified that I will insist upon all my legal rights to said premises and every part thereof against you as well as against the purchaser or purchasers thereof.

And I also hereby enter my protest against you or either of you proceeding to sell or selling said premises or any portion thereof.

B. MACKALL, Jr.

52 Exhibit J. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

Washington, D. C., *October* 23*d*, 1874.

To E. McB. Timoney, J. C. McKelden, trustees, and Wash. B. Williams, auctioneer.

Gentlemen: You and each of you are hereby notified that you have no lawful authority to sell the premises or any part thereof advertised by you to be sold on this day—October 23d, 1874—to wit, the property described in a certain deed of trust, dated August 4th, 1873, and recorded in Liber 728, folio 73, one of the land records for Washington county, in the District of Columbia.

And you are hereby further notified that I will insist upon all my legal rights to said premises and every part thereof against you as well as against the purchaser or purchasers thereof.

And I also hereby enter my protest against you or either of you proceeding to sell or selling said premises or any portion thereof.

B. MACKALL, Jr.

53 Washington, D. C., *October* 23*d*, 1874.

I hereby certify that I have this day served the original of which this is a true copy on E. B. McTimoney.

C. S. ALEXANDER.

Exhibit J. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

Washington, D. C., *October* 23*d*, 1874.

To E. B. McTimoney, J. C. McKelden, trustees, and Wash. B. Williams, auctioneer.

Gentlemen: You and each of you are hereby notified that you have no lawful authority to sell the premises or any part thereof advertised by you to be sold on this day—October 23d, 1874—to wit, the property described in a certain deed of trust, dated August 4th, 1873, and recorded in Liber 728, folio 73, one of the land records for Washington county, in the District of Columbia.

And you are hereby further notified that I will insist upon all my legal rights to said premises and every portion thereof
54 against you as well as against the purchaser or purchasers thereof.

And I also hereby enter my protest against you or either of you proceeding to sell or selling said premises or any portion thereof.

B. MACKALL, Jr.

Washington, D. C., *October 23d*, 1874.

I hereby certify that I have this day served the original of which this is a true copy on Wash. B. Williams.

C. S. ALEXANDER.

Exhibit J. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

Washington, D. C., *October 23d*, 1874.

To E. B. McTimoney, J. C. McKelden, trustees, and Wash. B. Williams, auctioneer.

Gentlemen: You and each of you are hereby notified that you have no lawful authority to sell the premises or any part thereof advertised by you to be sold on this day—October 23d, 1874—to wit, the property described in a certain deed of trust, dated August 4th, 1873, and recorded in Liber 728, folio 73, one of the land
55 records for Washington county, in the District of Columbia.

And you are hereby notified that I will insist upon all my legal rights to said premises and every part thereof against you as well as against the purchaser or purchasers thereof.

And I also hereby enter my protest against you or either of you proceeding to sell or selling said premises or any portion thereof.

B. MACKALL, Jr.

Washington, D. C., *October 23d*, 1874.

I hereby certify that I have this day served the original of which this is a true copy on J. C. McKelden.

C. S. ALEXANDER.

Exhibit K.

This indenture, made this thirteenth day of January, in the year of our Lord one thousand eight hundred and seventy-four, between Joseph B. Hill, as trustee and in his own right, and Brooke Mackall, Senior, of the first part, and Leonard Mackall, of the second part, all of the city of Washington, in the District of Columbia,
56 witnesseth:

That the said parties of the first part, for and in consideration of the sum of ten dollars in lawful money of the United States to them in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain and sell, alien, enfeoff, release, and confirm and convey, to the said party of the second part and his heirs and assigns forever all those certain lots, pieces, or parcels of land and premises situated in the town of Georgetown, in the District of Columbia, known and described as lots numbered two hundred (200) and two

hundred and twenty-seven (227), in Beatty and Hawkins' Addition to said Georgetown; also part of lot numbered two hundred and four (204), in same addition, fronting sixty-four (64) feet on the west side of High street and ninety-four (94) feet on the north side of Fifth street; also lots numbered nine (9), twenty-one (21), twenty-two (22), twenty-three (23), and twenty-four (24), in Beatty & Hawkins' Amend. Addition to said Georgetown; also parts of lots numbered one hundred and eleven (111) and one hundred and twelve (112),
in Beall's Addition to said Georgetown, fronting forty-six (46)
57 feet on the south side of Beall street, with a depth of sixty-
one (61) feet; also parts of the same lots numbered one hundred and eleven (111) and one hundred and twelve (112), fronting forty-one (41) feet on the east side of Washington street, with a depth of forty-four (44) feet; also all those certain lots, pieces, or parcels of land and premises in the city of Washington and District of Columbia and known and described as lot numbered seven (7), in square numbered two hundred and twenty-three (223); also lot numbered fifteen (15), in square numbered forty-one (41); also lots numbered two (2), three (3), four (4), and five (5), in Mackall's subdivision of original lot numbered five (5), in square numbered forty-three (43); also lots thirteen (13), fourteen (14), and seventeen (17), in square numbered seventy-six (76), and also the following part of lot numbered twelve (12), in square numbered fifty-six (56), beginning at the southeast corner of said lot twelve (12), and running thence north along 22nd street west thirty-four (34) feet, thence west seventy-three (73) feet and two and one-half (2½) inches, thence south thirty-four (34) feet, thence east to the place of beginning; also another part of the said lot numbered twelve (12), in square numbered fifty-six (56), beginning on said 22nd street west twenty (20) feet and nine (9) inches south from
the northeast corner of said lot twelve (12), and run-
58 ning thence south along said street eleven (11) feet and eight
(8) inches and three-quarters (¾) of an inch, and thence west one hundred and thirty-seven (137) feet and two and one-half (2½) inches to the rear line of said lot, thence north sixteen (16) feet and one and one-quarter (1¼) inches, thence east forty-four (44) feet and two and one-half (2½) inches, and thence south four (4) feet and one and one-quarter (1¼) inches, and thence east ninety-seven (97) feet to the place of beginning, together with all the buildings, improvements, rights, privileges, appurtenances, and hereditaments to the same belonging or in any manner appertaining, and all the remainders, reversions, rents, issues, and profits thereof, now due or to become due, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part and of each of them of, in, or to the said lots, parts of lots, pieces, or parcels of land and premises as hereinbefore mentioned and described:

To have and to hold the said lots, parts of lots, pieces, or parcels of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, for his and their sole use, benefit, and behoof forever—

In trust, nevertheless, for the use and purposes following, and none other—that is to say, to hold the same for the use and benefit
59 of the aforesaid Brooke Mackall, Senior, and subject to his absolute control and disposal, and to sell and dispose of the same as the said Brooke Mackall, Senior, may in writing direct and require.

In testimony whereof the said parties of the first part have hereunto set their hands and affixed their seals the day and year first hereinbefore written.

JOSEPH B. HILL. [SEAL.]
JOSEPH B. HILL, [SEAL.]
Trustee.
B. MACKALL, SEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. H. CRAIG.

DISTRICT OF COLUMBIA,
County of Washington. } *ss:*

I, W. H. Craig, a justice of the peace in and for the county of Washington, in the District of Columbia aforesaid, do hereby certify that Joseph B. Hill and Brooke Mackall, Sen., parties to a certain deed, bearing date on the thirteenth day of January, A. D. 1874, and hereunto annexed, personally appeared before me in the county and District aforsaid, the said Joseph B. Hill and Brooke Mackall, Senior, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be
60 their act and deed.

Given under my hand and my seal this 15th day of January, A. D. 1874.

W. H. CRAIG, *J. P.* [SEAL.]

Received for record June 3d, 1878, and recorded in Liber No. 884, folio 310 *et seq.*, one of the land records of the District of Columbia, and examined by—

GEO. A. SHERIDAN, *Recorder.*

EXHIBIT L. Filed Jun- 1, 1885. R. J. Meigs, Clerk.

John C. McKelden *et al.*
to
George W. Casilear. } Deed. Recorded Dec. 21st, 1874.

This indenture, made this twenty-third day of October, in the year of our Lord eighteen hundred and seventy-four, by and between John C. McKeldon and Edward McB. Timoney, trustees, of the city of Washington and District of Columbia, of the first part, and George W. Casilear, of the same place, of the second part.

Whereas Joseph B. Hill, by his deed of indenture, bearing date on the fourth day of August, A. D. 1873, and recorded in
61 Liber No. 728, fol. 73, of the land records for Washington county, in the District of Columbia, conveyed all the follow

ing-described lots of ground, situate and being in the city of Washington, in the District of Columbia, being known as lots numbered two (2) and three (3), in Mackall's subdivision of original lot numbered five (5), in square numbered forty-three (43); also lot numbered seventeen (17), in square numbered seventy-six (76), and part of lot numbered twelve (12), in square numbered fifty-six (56), beginning for said part on Twenty-second street west twenty feet nine inches south from the northwestern corner of said lot, and running thence south along said street eleven feet eight and three-fourths inches, thence west one hundred and thirty-seven feet and two and one-half inches, thence north sixteen feet one and one-fourth inches, thence east forty-four feet two and one-half inches, thence south four feet one and one-fourth inches, and thence east ninety-seven feet to the beginning; also another part of said lot numbered twelve (12), in square numbered fifty-six (56), being the south part of said lot numbered twelve (12), fronting thirty-four feet on said Twenty-second street and running back with that width on and parallel to the south line of said lot to the rear line of said lot, with improvements thereon, unto the
62 said John C. McKelden and Edward McB. Timoney, trustees,
and their heirs, in trust, to secure a certain indebtedness of Brooke Mackall unto F. A. Casilear, as will appear from reference to said in part recited deed; and whereas, default having been made in payment of the indebtedness thus secured, the said John C. McKelden and Edward McB. Timoney, trustees as aforesaid, having been so requested by the party secured, did expose the said above-described lots of ground at public auction on Friday, the twenty-third day of October, A. D. 1874, after having first duly advertised the time, place, and terms of said sale for ten (10) days in the Evening Star and National Republican, newspapers published in the city of Washington, in the District of Columbia, and in all other respects having complied with the provisions of said deed of trust, at which sale George W. Casilear, being the highest bidder therefor, became the purchaser of lots numbered two and three, in Mackall's subdivision of original lot numbered five, in square numbered forty-three, at and for the sum of twelve (12) cents per square foot, amounting in the aggregate to three hundred and sixty-eight $\frac{70}{100}$ dollars, and of lot numbered seventeen (17), in square seventy-six (76),—and for the sum of
63 twenty (20) cents per square foot, amounting in the aggregate to five hundred and thirty-seven dollars, and of part of lot numbered twelve (12), in square numbered fifty-six (56), beginning for said part on Twenty-second street west twenty-nine feet nine inches south from the northeastern corner of said lot, and running thence south along said street eleven feet eight and three-fourths inches, thence west one hundred and thirty-seven feet two and one-half inches, thence north sixteen feet one and one-fourth inches, thence east forty-four feet two and one-half inches, thence south four feet one and one-fourth inches, and thence east ninety-seven feet to the beginning, at and for the sum of twelve hundred dollars, and also another part of said lot numbered twelve (12), in square numbered fifty-six (56), being the south part of said lot

twelve, fronting thirty-four feet on said Twenty-second street and running back with that width on and parallel to the south line of said lot to the rear line of said lot, at and for the sum of twenty-five cents per square foot, amounting in the aggregate to six hundred and twenty-two $\frac{25}{100}$ dollars; and whereas the said George W. Casilear has fully complied with the terms of said sale and is therefore entitled to a deed for said lots of ground: Now, therefore, this indenture witnesseth that the said parties of the first part, for
64 and in consideration of the sum of two thousand seven hundred and twenty-seven $\frac{95}{100}$ dollars in lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey, unto said party of the second part, his heirs and assigns forever, all the above-described lots of ground, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand, either at law or in equity or otherwise however, of the said parties of the first part of, in, to, or out of the said described real estate and premises; to have and to hold the said described real estate and premises and appurtenances unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit, and behoof forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first here-
65 inbefore written.

J. C. McKELDEN. [SEAL.]
E. McB. TIMONEY. [SEAL.]

Signed, sealed, and delivered in the presence of—

J. McKENNEY.

DISTRICT OF COLUMBIA,
County of Washington, } *To wit:*

I, John McKenney, a notary public in and for the District and county aforesaid, do hereby certify that John C. McKelden and Edward McB. Timoney, parties to a certain deed bearing date on the twenty-third day of October, A. D. 1874, and hereto annexed, personally appeared before me in said county, and the said John C. McKelden and Edward McB. Timoney being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this nineteenth day of December, A. D. 1874.

[NOTARIAL SEAL.]

J. McKENNEY,
Notary Public.

66 *Subpœna to Answer Original Bill. Issued June* 1, 1885.

In the Supreme Court of the District of Columbia, June 1, 1885.

BROOKE MACKALL, Jr., Complainant, *against* GEO. W. CASILEAR *e- al.*, Defendants.	No. 9470, Equity Docket 24.

The President of the United States to George W. Casilear & wife, Jane; Leonard Mackall & wife, Rosalie; Don Barton Mackall, Benjamin Mackall, Louise Owens & Thomas Owens, Catharine Christy & Robert Christy, Edmund Brand, Mary E. Keller, defendants:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the original bill under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, JR., *Ass't Clerk.*

MEMORANDUM.—That the defendants herewith served are to enter their appearance in this suit in the clerk's office on or be-
67 fore the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's Return on Subpœna to Ans. Returned June 18, 1885.

Same accepted June 1, 1885.

E. BRAND.
MARY E. KELLER.

Served Leonard Mackall June 16th, 1885.

CLAYTON McMICHAEL, *Marshal.*

Demurrer of Leonard Mackall et al. to Original Bill. Filed Oct. 20, 1885.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL, Jr., *vs.* GEORGE W. CASILEAR *et al.*	Equity, No. 9470.

The demurrer of the defendants, Leonard Mackall & Rosalie Mackall, his wife; Don Barton Mackall, Benjamin Mackall, Louise Owens, & Thomas Owens, her husband; Catharine Christy, & Robert Christy, her husband, to the bill of complaint of Brooke Mackall, Jr., the above-named plaintiff.

These defendants, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint con-

tained to be true in such manner and form as the same is
68 therein set forth and alleged, do demur to so much of said bill as relates to lots No. 15, in square 41; to lots numbered 2, 3, 4, 5, subdivisions of original lot No. 5, in square 43; lot No. 12, in square 56, and lots 13, 14, & 17, in square 76, and for cause of demurrer show that the title to said lots, as shown from the face of the bill, has been adjudged and decreed to be in these defendants.

And, for further cause of demurrer, these defendants show, as appears from paragraph 9 of the bill, the legal title to lot 15, in square 41, and to lots 2, 3, 4, 5, in subdivision of original lot 5, in square 43, and lots 13, 14, 17, in square 76, was conveyed in trust to the defendant, Leonard Mackall, by deed executed on the 13th day of January, 1874, by Brooke Mackall, Sr., & Joseph B. Hill, and, as appears from the bill itself, said deed has not been revoked. And, for further cause of demurrer, these defendants show that the complainant has no interest or right in and to lot No. 2, in square No. 5; lots 3 & 7, in square 17; lot No. 3, in square No. 31; lot No. 2, in square 42; and lot No. 10, in square 62, and no proper title to institute a suit concerning the same, as appears from the face of the bill, to wit, the last clause of paragraph 11. And, for further cause of demurrer, these defendants show that the said bill is ex-
69 hibited against them and four other persons, defendants thereto, for several and distinct and independent matters and causes which have no relation to each other and wherein or in the greater part whereof these defendants are in no way interested or concerned and ought not to be implicated. Wherefore and for divers other good causes appearing in the said bill these defendants pray the judgment of this honorable court whether they shall be compelled to make any answer to such parts of said bill as they have hereinbefore demurred to.

S. S. HENKLE,
ROBERT M. NEWTON,
Sol's for Demurrants.

We herewith certify that the demurrers herein are well founded in point of law.

S. S. HENKLE,
ROBERT M. NEWTON,
Solicitors for Demurrants.

DISTRICT OF COLUMBIA, *ss:*

On this 20th day of October, 1885, appeared before me Leonard Mackall, one of the defendants to the within bill, &, being by me duly sworn, states that the within demurrers are not filed for delaying said cause.

L. MACKALL.

Subscribed & sworn to before me this 20th day of Oct., 1885.

70 R. J. MEIGS, *Clerk,*
By S. P. WILLIAMS, *Ass't Clerk.*

Demurrer of Defendants, Geo. W. & Jane Casilear. Filed Oct. 23, 1885.

In the Supreme Court of the District of Columbia.

Brooke Mackall, Jr.,
vs.
George W. Casilear *et al.* } No. 9470, Eq. Doc. 24.

Demurrer.

The defendants, George W. Casilear and Jane Casilear, demur to the complainant's bill, and for cause of demurrer show:

1. That it appears by the bill that the same is exhibited against these and ten other defendants for several and distinct matters and causes, in many whereof, as appears by the bill, these defendants are in no way interested or concerned, and that the bill is multifarious.

2. That it appears upon the face of the bill that the complainant has been guilty of such laches, unexplained or insufficiently explained, as disqualifies him from maintaining his said bill in a court of equity as against these defendants at this late day.

71 3. That the complainant has not in and by his bill made such a case as entitles him in a court of equity to any discovery or relief from or against these defendants as to the matters contained in the bill or any of such matters.

J. J. DARLINGTON,
Sol. for Def'ts Casilear.

I certify that in my opinion the foregoing demurrer is well founded in point of law.

J. J. DARLINGTON,
Counsel for Def'ts Casilear.

District of Columbia, *ss:*

I, George W. Casilear, on oath say that the foregoing demurrer is not interposed for delay.

GEO. W. CASILEAR.

Subscribed and sworn to before me this 23d day of October, 1885.

R. J. MEIGS, *Clerk,*
By M. A. CLANCY, *Ass't Clerk.*

Decree pro Confesso in Special Term against Def'ts Brand & Keller. Filed Oct. 31, 1885.

Supreme Court of the District of Columbia.

Brooke Mackall, Jr.,
vs.
George W. Casilear *et al.* } Equity, No. 9470.

72 This cause came on this day to be heard upon the bill and proceedings therein; and, it appearing to the court that the

defendants, Edmund Brand and Mary E. Keller, have made no appearance to the process served upon them and are in default of such appearance, it is ordered, adjudged, and decreed that the bill of complaint be taken as for confessed as against the said defendants.

A. B. HAGNER.

31st Oct., 1885.

Decree in Special Term Sustaining and Dismissing Bill as to Leonard Mackall et al. Filed Jan. 19, 1886.

In the Supreme Court of the District of Columbia.

Brooke Mackall, Jr.,
vs. } Eq., No. 9470.
Geo. W. Casilear *et al.*

This cause, coming on for hearing upon the demurrer of the defendants, Leonard Mackall, Rosalie Mackall, wife of the said Leonard; Don Barton Mackall, Benjamin Mackall, Louise Owens and Thomas Owens, her husband; Catharine Christy and Robert
73 Christy, her husband, to the bill of complaint, was argued by counsel; upon consideration whereof it is, this 19th day of January, 1886, ordered, adjudged, and decreed the said demurrer be sustained, and, the complainant declining in open court to ask leave to amend the bill as against the said parties, it is further ordered, adjudged, and decreed that as to the above-named defendants the bill be dismissed with costs.

CHARLES P. JAMES, *Justice S. C.*

Stipulation of Counsel as to Amendments to Bill. Filed January 28, 1886.

Supreme Court of the District of Columbia.

Brooke Mackall, Jr.,
vs. } Equity, No. 9470.
George W. Casilear *et al.*

It is hereby stipulated that the bill of complainant may be read as if amended by adding the following averments:

In paragraph seven: "That the complainant had no knowledge of the sales to Hill or either of them at the time of the conveyance to McKelden and McB. Timoney."

74 In paragraph eight: "The fair value of the property sold by McKelden and McB. Timoney, trustees, to Casilear was $7,500."

In paragraph nine: "Brooke Mackall, Sr., left complainant only one dollar by his will, giving all the rest of his estate to his other children."

In paragraph eleven by the words interlined therein.

W. WILLOUGHBY,
Sol. for Complainant.
J. J. DARLINGTON,
Sol. for Def'ts Casilear.

Decree in Special Term Dismissing Bill on Demurrer. Filed Jan. 28, 1886.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL, Jr.,
vs. } No. 9470, Eq. Doc. —.
GEORGE W. CASILEAR *et al.*

This cause, after the decree passed therein on the 19th day of January, A. D. 1886, dismissing the bill as to the defendants Leonard Mackall, Rosalie Mackall, Benjamin Mackall, Don Barton Mackall, Louise Owens, Thomas Owens, Catharine Christy, and Robert Christy, coming on for further hearing upon the demurrer of the de-
75 fendants George W. Casilear and Jane Casilear, and having been argued by counsel and duly considered, it is therefore by the court, this 28th day of January, A. D. 1886, adjudged and decreed that any rights which the complainant may have had in the property conveyed by McKelden and McB. Timoney, trustees, to the defendant George W. Casilear, described in the bill, are forever barred by the laches of the said complainant, and it is therefore further ordered that the bill be, and the same hereby is, dismissed.

CHARLES P. JAMES, *Justice.*

Appeal to General Term. Filed Feb. 2, 1886.

Supreme Court of the District of Columbia.

BROOKE MACKALL, Jr.,
vs. } Equity, No. 9470.
GEO. W. CASILEAR *et al.*

The clerk will please note an appeal in this case from the decrees of Jan. 19th and Jan. 28th, 1886, in special term to the general term of the court.

W. WILLOUGHBY,
Sol. for Comp't and App't.

76 Appeal entered as directed, Feb'y 2nd, 1886, by the clerk.

Stipulation to Waive Printing. Filed April 23, 1886.

Supreme Court of the District of Columbia.

BROOKE MACKALL, Jr.,
vs. } Equity, No. 9470.
GEO. W. CASILEAR and Others.

The printing of the abstract of pleadings required by the rule in cases appealed to the general term is hereby waived in this case.

W. WILLOUGHBY,
Sol. for Comp't.
J. J. DARLINGTON,
Sol. for Def'ts Casilear.

Decree in General Term Affirming Decrees Below and Dismissing Bill with Costs. Filed Jan. 10, 1887.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL *vs.* GEORGE W. CASILEAR *et al.*	No. 9470, Equity.

77 This cause coming on to be heard in the general term upon the appeal of the complainant from the decrees of the special term dismissing the complainant's bill, and having been argued by counsel for all the parties, and having been duly considered, it is by the court in general term, this 10th day of January, A. D. 1887, ordered, adjudged, and decreed that the said decrees of the special term be, and the same are hereby, affirmed, and that the complainant's bill be, and the same hereby is, dismissed with costs.

W. S. COX, *J.*

Motion for and Allowance of Appeal to the Supreme Court of the United States.

Supreme Court of the District of Columbia. In General Term, Jan'y 13, 1887.

BROOKE MACKALL, Jr., *vs.* GEORGE W. CASILEAR and Others.	Equity, No. 9470.

78 And now comes the complainant, Brooke Mackall, and prays an appeal from the decree rendered herein by this court on the 10th day of January, 1887, to the Supreme Court of the United States.

BROOKE MACKALL, *Comp't,*
By his sol., W. WILLOUGHBY.

Appeal allowed in open court this 13th day of January, A. D. 1887, bond, to operate as a supersedeas, to be given in the penalty of $250.

By the court:

W. S. COX, *J.*

79 In the Supreme Court of the District of Columbia, the 13th day of January, 1887.

BROOKE MACKALL *vs.* GEORGE W. CASILEAR and Others.	No. 9470. In Equity.

Know all men by these presents that we, Brooke Mackall and Thomas E. Young, are bound unto the above-named George W. Casilear & the other defendants in the cause in the sum of two hundred and fifty dollars, to be paid to the said defendants, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 13th day of January, 1887.

Whereas the above-named Brooke Mackall hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Brooke Mackall shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) BROOKE MACKALL. [SEAL.]
(Signed) THOS. E. YOUNG. [SEAL.]

Sealed and delivered in presence of—
(Signed) W. WILLOUGHBY.

Approved.
(Signed) W. J. COX, *J.*

80 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 6th day of September, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 6th day of Sept., 1887.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 6th day of September, 1887.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Dist. of Columbia supreme court. No. 97. Brooke Mackall, appellant, *vs.* George W. Casilear *et al.* Filed September 6, 1887.

Office Supreme Court U. S.
FILED.
NOV 6 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 97.

BROOKE MACKALL, Jr., Appellant,

vs.

GEORGE W. CASILEAR et al.

BRIEF FOR APPELLANT.

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No. 97.

Appeal from the Supreme Court of the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

Facts.

The facts of record are substantially as follows:

The bill was, in the Court below, dismissed on demurrer.

Two demurrers were filed, one October 20, 1885, by the defendant, Leonard Mackall and others, heirs of Brooke Mackall, Sr., deceased. (R., 29.) The ground of demurrer by said heirs as to lot 15, in square 41, lots 2, 3, 4, and 5, subdivisions of original lot 5, in square 43, lot 12, in square 56, and lots 13, 14, and 17, in square 76, is that the face of the bill shows that, as to these, that the title has been adjudged to the said heirs. (R., 30, fol. 68.)

The further ground for demurrer by said heirs is, that the ninth paragraph of the bill shows the legal title to lot 15, square 41, and lots 2, 3, 4, and 5, in subdivision of original lot 5, square 43, and lots 13, 14, and 17 in square 76, was conveyed to Leonard Mackall by deed of January 13, 1874, by Brooke Mackall, Sr., and Joseph Hill, and that deed, the bill shows not to be revoked.

The further ground of demurrer by said heirs is, that complainant has no interest in lot 2, Sq. 5, nor in lots 3 and 7, Sq. 17, nor in lot 3, Sq. 31, nor in lot 2, Sq. 42, nor in lot 10, Sq. 62, and no proper title to institute a suit concerning the same, as appears from the face of the bill, to wit, the last clause of paragraph eleven.

Said demurrer of heirs further assigns for cause of demurrer that the bill is against the said heirs and four other defendants for several distinct and independent matters having no relation to each other, and in the greater part of which defendants are not interested. (R. 30, fol. 68, 69.)

The other demurrer was by George W. Casilear and his wife, filed October 23, 1885. The grounds of demurrer were, (1) that the bill is against the demurrants and ten others, for distinct matters, in many of which demurrants are not interested; (2) that the bill shows that complainant is guilty of unexplained or insufficiently explained laches; (3) that complainant has not made a case entitling him to relief or discovery. (R. 31, fol. 70 and 71.)

Analysis of Bill.

The substance of the bill, filed June 1, 1885, is as follows, omitting the formal and immaterial parts:

In paragraph *one :*

It makes G. W. Casilear and his wife, Leonard Mackall, and the other children of Brooke Mackall, Sr., and Edmund Brand and Mary E. Keller, heirs of Louis Brand, deceased, defendants.

Paragraph *two :*

That in 1863, complainant, in virtue of the conveyance by Pairo and others (R., 7), exhibit "A," owned the property described in paragraph two of bill (R. I.), to wit, lot 2, square 5; lots 3 and 7, square 17; lot 3, square 31; lot 15, square 41; lot 2, square 42; lot 5, square 43; lot 12, square 56; lot 10, square 62; lots 13, 14 and 17, square 72.

Paragraph *three* (R., 2):

That, May 5, 1866, complainant executed to his father, two promissory notes, aggregating $596.58, and a deed of trust to his father as trustee, exhibit "B," the father, as a notary, taking the acknowledgedment of the trust deed to himself; securing said two notes; the trust deed covering lot 2, square 5; two parts of lot 12, square 56; lots 14, 17, and part of 13, square 76; that the notes were without consideration, &c., and never acted on for the purposes for which given.

That under that trust, a sham sale (the bill stating why sham) was made to Hill, evidenced by exhibit "D," of property named at Rec. 2, fols. 3 and 4; with the exception of one sub-division of lots 13 and 14, square 76, known as subdivision A, which had been previously disposed of.

Paragraph *four* (R., 3):

The $1,000 note and deed of trust, named in paragraph four, were discharged, and so *admitted* of record, in exhibit "F."

Paragraph *five* (R., 3):

That, July 14, 1868, conveyance, exhibit "F," was executed by Morsell, Mills and wife, and complainant, to Brand as trustee, acknowledging satisfaction of the $1,000 note named in paragraph four; and securing the payment of $2,000 note to the father of complainant, by a trust to said Brand, embracing lot 15, square 41, and lot 5, square 43; avers this note was to raise money for the benefit of said father and son, and that it never was used, and was without consideration.

Paragraph *six* (R., 3–4):

Pursuant to this deed of trust to Brand, a sham sale was made to said Hill, and on July 29, 1873, was evidenced by exhibit "H," conveying to said Hill lot 15, square 41, and nos. 2, 3, 4, 5, subdivisions of lot 5, square 43.

Paragraph *seven* (R., 4):

That, six days after the date of deed, exhibit "H," Hill executed the conveyance, exhibit "I," August 4, 1873, conveying to McKelden and McB. Timoney, as trustees, to secure a $3,000-note by Brooke Mackall, Sr., to F. A. Casilear, due at one year, said two trustees and Casilear having full knowledge, at the time of taking the conveyance exhibit "I," of the defects of title mentioned in the bill; such notice being by record and otherwise.

Paragraph *eight* (R., 4 and 5):

That October 23, 1874, said trustees, McKeldon and Timoney, sold and conveyed, by deed exhibit "L," subdivisions 2 and 3 of lot 5, sq. 43, and lot 17, sq. 76, and two parts of lot 12, sq. 56; that at this trustees' sale of October, 1874, complainant gave written notice (Exhibit J., R., 22) of the defects of title, set forth in the bill, as to the said lots then being sold.

Paragraph *nine* (R., 5):

January 13, 1874, Hill, as trustee, also in his own right, and Brooke Mackall, Sr., joined in conveying to Leonard Mackall, as trustee, lot 15, square 41, lots 2, 3, 4, 5, in subdivision of lot 5, square 43, and lots 13, 14, and 17, square 76, and two parts of lot 12, square 56, as set forth in exhibit "K," these lots being the same conveyed to Hill in the said deeds "D" and "H," and being void for the reason set forth in the bill.

Paragraph *ten* (R., 5 and 6):

Defendant Casilear claims title to lot 17, square 76, the two parts of lot 12, square 56, as derived from the deed of Brooke Mackall, Sr., trustee to Hill (exhibit "D"); and, also, to subdivisions 2 and 3, of lot 5, square 43, as derived from the deed of Brand to Hill (exhibit "H"), and then sets forth how the heirs claim under exhibits "D" and "H."

Paragraph *eleven* (R., 6):

This paragraph is devoted to explaining the reasons for delay in bringing the suit.

Prayer is for process, for answer on oath, that the two deeds to Hill be adjudged void, &c., and for an accounting.

Assignment of Errors.

1. The Court erred in sustaining the demurrer of Leonard Mackall and others to the bill (R. 29).

2. The Court erred in sustaining the demurrer of George W. Casilear and wife to the bill (R. 31).

3. The Court erred in failing to find, under the averments of the bill, that the sale evidenced by exhibit "D" was void.

4. Court erred in failing to find that the sale, evidenced by exhibit "H," was void, under the averments of the bill.

5. Court erred in failing to find that, according to the averments of the bill, the deed exhibit "B" was void.

6. Court erred in failing to find that, under the averments of the bill, the conveyance evidenced by exhibit "F" was void.

7. Court erred in failing to render a decree in favor of the complainant, setting aside the two deeds to Hill, made exhibits "D" and "H," and all other deeds and conveyances based upon the same.

8. The Court erred in failing to find that the plaintiff was the owner in equity of the lots described in the ninth paragraph of the bill.

9. For other errors appearing in the record.

BRIEF.

Multifariousness.

First, as to the multifariousness. Both demurrers make the point that the bill is bad for multifariousness.

One ground of the demurrer on behalf of the heirs (R., 30, fols. 68, 69) is for that "distinct and independent matters and causes that have no relation to each other and wherein or in the greater part whereof these defendants are in no way interested or concerned, and ought not to be implicated."

The demurrer on behalf of Casilear and wife (R., 31, fols. 70, 71) for cause of demurrer, assigns that the bill is against Casilear and wife and ten others, for distinct matters, in many whereof, defendants demurring, are not interested.

This ground of demurrer, we submit, is not well taken. The two classes of defendants are Casilear and wife, of one class, and the heirs of Mackall, Sr., of the other class.

The bill is framed not only to set aside the deed under which Casilear and wife claim, to wit, exhibit "L" (R., 26), but, also, to set aside the deed to Leonard Mackall, exhibit "K" (R., 24), named in paragraph nine of the bill (R., 5), and, therefore, the heirs of Brooke Mackall, Sr., were necessary defendants to the bill, and were interested in, and in point of title, connected with the same alleged frauds which put the alleged title in Joseph B. Hill, who unites with Brooke Mackall, Sr., in making the title to the heirs for lot 15, square 41, lots 2, 3, 4, 5 in subdivision of lot 5, square 43, and lots 13, 14 and 17 in square 76, and two parts of lot 12, square 56.

The bill being one framed to set aside this deed, "K," to Leonard Mackall, as well as the deed "L," to Casilear, and the deeds "D" and "H" to Hill, it became necessary to make both classes of claimants defendants, to wit: Hill, and those claiming under his deed "L," and the heirs of Brooke Mackall, Sr., claiming under deed "K," (R., 24).

When the attack of a bill is made upon the common sources of title, from which the various claimants, whose title is attacked in the bill, claim title, it is manifest that all such claimants are necessary parties, and that the bill is not multifarious because all such claimants are united, merely because the property so attacked has come to belong to independent ownerships.

The leading case upon this subject in this Court is the case of Gaines *v.* Chew, 2 How., 619. In that case the Court held what is thus stated in the head notes:

> "It is not practicable to define multifariousness. Each case must be examined with reference to the leading principles, not to subject one party to a litigation between others *in which he has no interest*, and not to allow an unnecessary multiplicity of suits.
>
> "*A bill which claims different parcels of land, as devisee, or heir at law, and shows that each defendant claims in severalty as purchaser under a will, which the bill impeaches, and the effect of which is to devise any of the lands which the bill controverts, is not multifarious, though the case of each defendant who may claim protection as bona-fide purchaser without notice, is distinct from the cases of all the others.*"

In Barney *v.* Latham, 103 U. S., 214, 215, the same doctrine is repeated; the Court holding that a defendant may be a proper party, though not indispensable, and that, consistently with "established rules of pleading he may be governed often by considerations of mere convenience; and it may be that there was or is such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced by it, at least in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder."

The Court here cites Oliver *v.* Piatt, 3 How., 333, 411, where the Court said:

> "It was well observed by Lord Cottenham, in Campbell *v.* Mackay, 1 Myl. & Cr., 603, and the same doctrine was affirmed in this court in Gaines and Wife *v.* Relf and Chew, 2 How., 619, 642, that it is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the Court."

In that case the Court refused to treat a bill as multifarious because certain parties were brought into the case who might not be regarded as indispensable, although appropriate parties to be joined in the suit. The Court says (p. 215):

> "Consistently with established rules of pleading, he may be governed often by considerations of *mere convenience*; and it may be that there was, or is, such a *connection* between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced by it, at least in such a sense as to protect the complaint against a demurrer upon the ground of multifariousnes or misjoinder."

These doctrines announced by this Court in Gaines *v.* Chew, 2 How., 619, and in Barney *v.* Latham, 103, U. S., 215, have been repeated in Oliver *v.* Piatt, 3 How., 441; Sheldon *v.* Packet Co., 10 Bissell, 473; S. C., 8 Federal Reporter, 770; Bank *v.* Sprague, 19 Blatchf., 532; Norris *v.* Hassler, 22 Federal Reporter, 403; Railroad Company *v.* Dyer, 1 Sawyer, 650; Mining Debris Case, 8 Sawyer, 636; S. C., 16 Federal Reporter, 634; Gaines *v.* Mausseaux, 1 Woods, 121; Pierpont *v.* Fowler, 2 Wood & M., 34.

Manifestly the same grounds of complaint that are brought against the title of Casilear, who holds under exhibit "L," enter into and affect the title of the heirs as derived under the deed "K" to Leonard Mackall, named in paragraph nine of the bill (R., 5).

There are other considerations that furnish an answer to the claim of multifariousness, which need not be here repeated.

One of these is thus stated in the brief in general term below:

It was necessary to make the children and devisees of B. Mackall, Sr., parties, for the reason that as to lots that came to Casilear through the sale under the deed of trust to B. Mackall, Sr., if such sale, evidenced by exhibit "L" (R., 26) were set aside, the legal title would be in them as heirs or devisees. His individual conveyance to Leonard Mackall, exhibit "K" (R., 24) not purporting to be made by him as trustee, nor under the provisions of the deed of trust to him, would not transfer such legal title to him, Leonard Mackall. They should be parties for the same reason that the heirs of the trustee, Brand, are made parties.

Another reason why the bill is not multifarious, as stated in the brief below, and which we here adopt, is thus expressed:

Such children and devisees claim the lots not purchased by Casilear under the same deeds as those upon which he relies. Hill was the purchaser at both sales, and the apparent title to all came to him; but he, in executing the deed of trust under which Casilear became the purchaser, took some coming to him from the deed of trust to Mackall, Sr., and some from the deed to Brand, leaving some claiming through both of said deeds of trust, and which are those claimed by the devisees of Mackall, Sr. Both are, then, interested in both of the same deeds which are sought to be set aside.

The brief below cites, in addition to the above-cited authorities, the following:

Fellows *v.* Fellows, 4 Cowen, 682.
15 Am. Decis., 412, and note.
40 Am. Decis., 106 and note.

Here we leave the point as to the bill being objectionable on demurrer on the ground of multifariousness.

General Merits Shown by the Bill.

Another legal question in the case (aside from the matter of laches as raised by the demurrers) is, whether the averments of the bill are enough, in their legal significance and effect, to avoid the deeds exhibit "B" (R., 2, fols. 3, 4, 5) to Mackall, Sr.; exhibit "D" (R., 2, 3, and 11), by Mackall, Sr., as trustee, to Hill, and Exhibit "H" (R., 4, fols. 8, 9, and 41), by Louis Brand, trustee, to Hill, and all deeds based on the alleged title created by these three deeds.

Averments Affecting Validity of Exhibits "B," "D" and "H."

The averments regarding the validity of exhibit "B" are in paragraph three (R., 2 and 3). They, in substance and effect, show that the notes secured by this deed were made to raise money for the support of Brooke Mackall, Sr., and the complainant; that these notes were never discounted or used for that purpose; that the notes were given *without any consideration;* that many years after the notes were given, and when the object thereof had failed, the notes and deed of trust were sought to be used for purposes foreign to the origin of the notes and deed of trust; that the deed of trust was acknowledged only by and before the trustee of the deed of trust, Brooke Mackall, Sr.

Then in regard to the deed by Brooke Mackall, Sr., trustee to Joseph D. Hill, of June 26, 1876, exhibit "D" (R., 11), the averments in paragraph three (R., 2 and 3), are in substance, that—

After said deed, exhibit "D" was made, a variance occurred between complainant and his father, Brooke Mackall, Sr.; that the father, without the consent or knowledge of complainant, advertised the property covered by exhibit "B," except subdivisions 13 and 14 in square 76 (a copy of the advertisement is filed, exhibit "C" (R., 11); this advertisement was published for *three* days, whereas the deed of trust called for *sixty* days; that the sale was kept secret, and was concealed from complainant; was not held on the premises, but at rooms of auctioneer; no bidders present except Mackall, Sr. and Hill; that sale was made for the benefit of the trustee, Mackall, Sr., that no consideration passed, &c.

The averments affecting the validity of the deed to Hill, exhibit "H" (R., 18), are in paragraph six.

We come again below, and in another connection, to the averments of the bill affecting the validity of the deeds to Hill.

The advertisement for this sale by Brand is set forth as exhibit "G" (R. 18). It was published for but *three* days, the sale was without knowledge or consent of complainant; without any written request as prescribed; place of sale was the private room of auctioneer, no bidders at sale; sale made at instance of Mackall, Sr., trustee, struck off to Hill for a *nominal sum*, he paying *no money* therefor; it being well understood that the *real purchaser was Mackall, Sr.*, and no payment or account ever made to complainant. (R., 3 and 4.)

Of course, under the facts avered as to exhibit "H," the same considerations which render the conveyance exhibit "D" void render this sale and conveyance "H" void.

The bill further avers, in paragraph five (R., 3), that the deed exhibit "F" (R., 15), by Morsell, Mills and wife, and complainant to Brand as trustee of July 14, 1868, was made to secure $2,000 to Mackall, Sr., from Brooke Mackall, Jr.; but in truth and fact that note was an *accommodation note* to raise money for the *common* benefit of both; but that *no money* was ever so raised and there was no *consideration* for the note, etc.

Bill further avers, in paragraph seven, as to the deed of August 4, 1873 (exhibit "I," R., 20), being the deed of said Hill to Trustees McKeldon and Timoney, that it (said exhibit "I") was made with *full knowledge* on part of both trustees and of F. A. Casilear (R., fol. 9), at the time of its making, of the defects of the said title held by Hill, such knowledge being derived both by record and otherwise, and that said Trustees McKeldon and Timoney were not *bona-fide* purchasers, &c.

Without pursuing, in this connection, these details further, it is simply obvious that the titles attacked in this bill all rest upon the validity of exhibits "B," "D," and "H," that these being overthrown, all titles and claims held under the various deeds exhibited in the bill fall also.

Without entering into the full details regarding the invalidity of the various deeds depending for their validity upon the validity of the sales evidenced by exhibits "B," "D," and "H," it will be quite sufficient, as characterizing and showing the invalidity of *all* the deeds attacked in this case, for us to take two specimens which we suppose to be regarded as the least vulnerable of all.

We first take the deeds under which George W. Casilear claims.

Said Casilear obtained whatever title he, in equity, holds by the grant of the trustees, John C. McKeldon and Edward McB. Timoney, trustees under their deed. (Exhibit "L," R., 26.) This deed recites (R., 26) that Hill, on the 4th of August, 1873, conveyed the land deeded to said G. W. Casilear, by said deed of August 4, 1873, to said trustees, McKeldon and Timoney. Thus it shows Hill to be the source of G. W. Casilear's title:

The bill avers, paragraph eight (R. 4 and 5, fols. 10. 11), as to this sale to G. W. Casilear by said trustees, McKeldon and Timoney, that the trustees had full and absolute written notice of the frauds, &c., set out in the bill (as set forth in exhibit "J," R., 22), such notice had been publicly announced at their sale to said G. W. Casilear, and this *before* the sale and in hearing of *all bidders*, thus giving G. W. Casilear knowledge of the alleged defects of power, in said trustees, to make said sale; and further that (as averred in paragraph seven, folio 90), "said trustees and said F. A. Casilear, owner of the $3,000 note, had full knowledge, at the time (of making said deed of trust, exhibit 'I,' R., 20) of the defects of title herein (in the bill) mentioned, both by record and otherwise; and were not *bona fide* purchasers, or creditors, as to the said property mentioned in said conveyance."

The bill thus, and therefore, expressly alleges that *before* the deed of trust "I," securing F. A. Casilear his $3,000, was executed, Casilear and the trustees had full notice of whatever the bill sets forth as affecting the title held by said Hill and by said two trustees, McKeldon and Timoney.

Averments Affecting Hill's Title.

We, therefore, turn to the averments of the bill to see what facts are averred affecting the title of Hill and of Brooke Mackall, Sr., and affecting their ability to make a good title to said last named trustees, McKeldon and Timoney.

We have already alluded to these averments of the bill showing the facts which invalidate the deeds to Hill, one being the deed exhibit "D" of June 26, 1873, of Brooke Mackall, Sr. (R., 11), and the other the deed "H," of July 29, 1873, by Brand, trustee, to Hill (R., 18).

The substance of the averments tending to invalidate the deed exhibit "D," is, that the notes, aggregating $596.58, for which this trust deed, exhibit "B," was given, were got up for the purpose of borrowing money for the support of complainant and his father; that they were never used for that purpose; that no money was ever obtained thereon; that the notes were wholly without consideration; that seven years and nearly two months after these notes were so given, and had failed to be used for the purposes for which they were drawn, and after a variance had arisen between father and son, and without the knowledge or consent of son, the father took advantage of his possession of the notes and deed of trust "B," securing them, and proceeded in a scheme to sell the property and defraud complainant; that, although the deed of trust required sixty days' notice of sale, only three days' notice was given; that the sale was intended to be kept concealed from complainant, and was not held upon premises, but at rooms of auctioneer, where no bidders were present; that, at instance of the father, the property was struck off nominally to Hill, but really *for the benefit of the father;* that no money whatever was paid by Hill, and his name was used only to present the appearance of the sale *not* being made by the trustee to himself; and that he might not appear to be the purchaser at his own sale; that it was a scheme by the father to divest the son of his property, and to obtain it *without paying anything for it;* that, in pursuance of this scheme, the deed exhibit "D" was executed by the father, as trustee, to Hill, for nominally $2,000—*in reality, nothing was paid by Hill to said trustee, or to complainant,* and that the said deed "D" was void. (R., 2 and 3.)

Then, as to the deed to this same Hill, to wit exhibit

"H," the averments, in paragraph six, are substantially the same as those in regard to the deed exhibit "D."

Moreover, it is averred, that after Hill had thus obtained these pretended conveyances, he made the deed of trust to the trustees, McKeldon and McB. Timoney, the facts affecting which conveyance, exhibit "I," we have already stated, showing that the trustees and F. A. Casilear, the owner of the $3,000 note secured by the deed of trust, exhibit "I," had full knowledge of said frauds in making title to Hill before the money was loaned.

Rec., 4, fol. 9, &c.

The averments, in this regard, are in paragraphs seven and eight, as already stated, it being expressly averred and charged that George W. Casilear knew all the above recited facts invalidating Hill's title and the title of the two trustees, McKeldon and Timoney, the averment in this behalf, as to the said George W. Casilear, being at folio 10, where it is averred, "notwithstanding this (notice 'J' given at sale) said trustees proceeded to offer said property for sale, whereupon the defendant, George W. Casilear, though knowing well the contents of the said notice, exhibit 'I,' and of the defects of title herein set forth, bid in the property at $2,722.95, and thereupon the deed, exhibit 'L,' was made."

Substantially the same averments which go to invalidate the title of George W. Casilear are made going to invalidate the title alleged to be conveyed by deed, exhibit "K," of January 13, 1874 (R., 24), being the one under which the heirs claim (R., 24).

Such, in substance, are the facts admitted by these demurrers.

Authorities.

The two leading doctrines of equity jurisprudence which are brought into view by the question, whether under such averments as are now recited, going to invalidate the said deed "L" to Casilear, and the deed "K" to Leonard Mackall are valid, are: First. The rule of strict integrity and good faith required of trustees in dealing with trust property; and, second. The rule defining the rights and obligations of purchasers setting up the protection accorded to *bona fide* purchasers.

In Story's Equity Jurisprudence, secs. 321–322, the jealousy and extreme strictness with which courts of equity watch the transactions of trustees, and compel them to be scrupulously fair and just, are fully stated, and he there says that the relation of a trustee is, in said regards, substantially identical with the other fiduciary relations, such as guardian and ward; and in sec. 317, regarding this matter of the fairness required of such persons standing in fiduciary relations, the author says:

> "It is obvious that, during the existence of the guardianship, the transactions of guardian and ward cannot be binding upon the ward if they are of *any* disadvantage to him; and, indeed, the relative situation of the parties imposes a general *inability* to deal with each other. Courts of equity proceed yet farther; in cases of this sort, they will not permit transactions between guardians and wards to stand even when they have occurred *after* the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances *demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith (uberrima fides) on* the part of the guardian. For, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if *all* the duties attached to the situation have not ceased."

Or, take the following from Kerr on Fraud, p. 154:

"It is the duty of a person to use his *best* exertions for the *advantage* of the *cestui que trust*. He may not place himself in a situation in which his *interests* will come in conflict with that which his duty requires him to do. *Any personal benefit* which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of his duty, and *will enure to the benefit of the trust estate.*"

To this the author cites a great many English and American authorities; amongst the American, being:

Barney *v.* Saunders, 16 How., 535.
Mitchell *v.* Wall, 6 Bush, 659.
Van Epps *v.* Van Epps, 9 Paige, 237.
Brinkerhoff *v.* Brown, 4 Johnson's Chy. Rep., 693.

The author proceeds:

> "There is no more sacred rule of equity than that *a trustee cannot so execute a trust as to have the least benefit from it himself.*"

To this the author cites, of the English cases, Forbes *v.* Ross, 2 Cox, 116; and of the American cases, cites Michoud *v.* Girod, 4 How., 503; Bank *v.* Torrey, 7 Hill, 260; Croney *v.* Ring, 11 Barbour, 356; Murray *v.* Vanderbilt, 39 Barbour, 140; Slew *v.* Law, 3 Blatchf., 459.

The case of Michoud *v.* Girod, *supra*, is, of course, exceedingly familiar, and a leading case in this country.

At the opening of the opinion in that case, by Wayne, J., he states this doctrine in the following words:

> "We concur with the learned judge in the Circuit Court in setting aside the purchases by which Nicholas Girod and Juan Francois Girod became possessors of their testator's entire estate. But the morality and policy of the law, as it is administered in courts of equity, induce us to add that those purchases were fraudulent and void, and may be declared to be so, without any further injury, upon the ground that they were made by the intervention of persons who were nominal buyers of the property for the purpose of conveying it to the executors. Such a transaction carries fraud upon the face

of it. (Lord Hardwicke *v.* Vernon, 4 Ves., Jr., 411; 14 Ves., Jr., 504; 2 Bro. C. C., 410, note.) It matters not, in such a case, whether the sales are made with or without the sanction of judicial authority, or with ministerial exactness. *The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not—per interpositam personam—carries fraud on the face of it.*"

An apology seems to be required for even alluding to so familiar and so settled a doctrine as has just been stated; and yet it seems to be forced upon counsel to do so by the fact that, in sustaining the demurrers in the present case, and thereby holding the deeds to Hill, and to those claiming under him, to be good, notwithstanding the frauds which the bill sets out, this universal, fundamental and most excellent doctrine of courts of equity has been utterly disregarded. This is palpably so, unless, indeed, the decree sustaining the demurrers is to find its justification upon some *other* ground than that the transactions resulting in making the deeds to Hill, and to those claiming under Hill, were *honest.*

We, therefore, turn to those *other* grounds (aside from that already considered, to wit, multifariousness), as we understand them, on which it is claimed that the demurrers were properly sustained.

One of those *other* grounds we understand to be embraced in the third ground of demurrer as stated in the demurrer of George W. Casilear (R., 31, fols. 70, 71), this third ground being in substance a general demurrer.

Bona-Fide Purchaser.

Under this branch of the case it is by us understood that George W. Casilear claims to be protected as a *bona fide* purchaser.

We have already seen that the bill distinctly avers that, at the time of his purchase, the purchaser, George W. Casilear, had full knowledge of all the frauds set up in the bill; also that, at the time of taking the deed of trust, exhibit "I" (R., 20), under which the sale was made to George W. Casilear; also the trustees, and their beneficiary and the owner of the $3,000 note. F. A. Casilear had full notice of all of said frauds.

Now under such state of fact as is averred in the bill so alleging fraud, and attributing full knowledge thereof *both* to the owner of the $3,000 note and to the purchaser at the sale made for the benefit of that note, it seems utterly impossible to hold that either F. A. Casilear or George W. Casilear can sustain the position, in a court of equity, of *bona fide* purchaser.

Two principles, regarding the law of *bona fide* purchaser, are proper here to be stated.

One is, that the defense of *bona fide* purchaser is one wherein the *affirmative and burden of proof is on the party relying on it.*

In the case of Boone *v.* Childs, 10 Peters, 211, this Court, speaking of the law affecting *bona fide* purchasers, says:

> "It (the defense of *bona fide* purchaser) must be established affirmatively by the defendant. In setting it up by bill or answer, it must state the date of purchase, the deed, the parties, contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money and the delivery of the deed, and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred, and the answer or plea show how the grantor acquired titile."

This doctrine is fully re-affirmed and repeated in the opinion of Nelson, J., in Smith *v.* Orton, reported at pp.

LXXV and LXXVIII of Appendix to vol. 131, U. S. Reports.

The other principle is that, in order to entitle a party standing in the position in which the bill places George W. Casilear, holding under deed exhibit "L," and also the position of the heirs of Brooke Mackall, Sr., holding under the sale evidenced by exhibit "K," to the rights of a *bona fide* purchaser, he must not only show that he had no *express* knowledge of the facts that would vitiate the title; but the rule is that "*a knowledge of facts which, if traced and understood, will lead to a knowledge of a hostile title, it is sufficient to charge a purchaser with notice of that title.*"

This doctrine, in substance, will be found laid down in Shaw *v.* Railroad Company, 101 U. S., 557, where the Court held as follows:

> "The purchaser of a bill of lading who *has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding debt, is not a bona fide purchaser nor entitled to hold the merchandise covered by the bill against its true owner.*"

The same thing is held in Walburn *v.* Babitt, 16 Wall., 577, 581, and cases cited in the note.

Same thing is found in Gaines *v.* De La Croix, 6 Wall., 719.

In Brush *v.* Ware *et al.*, 15 Peters, 93, the head note accurately states what was held, by this Court, touching this point. It says:

> "The law requires *reasonable diligence in a purchaser to ascertain any defect of title.* But when such defect is brought to his knowledge *no inconvenience* will excuse him from the *utmost scrutiny.* He is a voluntary purchaser, and having notice of a fact which casts *doubt* on the validity of his title, the rights of innocent persons are not to be prejudiced through his negligence."

Here we leave that part of the argument which is devoted to showing that the bill sets up such facts as deprive both George W. Casilear and also the heirs of B. Mackall, Sr., of all equitable title to the lands in controversy, so far as such equitable title depends either upon the original merits of the case, or, as to George W. Casilear, upon the doctrine of *bona fide* purchaser.

Any omissions or defects in this statement of the case in the particulars now gone over we will endeavor to supply in the oral argument, if need be.

Laches.

We now turn to the matter of *laches* as set up in the demurrers, both that in behalf of Casilear and also of the heirs.

At the outset of the discussion of the matter of *laches*, it is proper to fix carefully in mind the distinction between the claim of Casilear, on the one hand, and of the heirs on the other.

That distinction is mainly, if not exclusively, in this, to wit, that F. A. and G. W. Casilear claim to have *parted with value*, on the faith of the conveyances, to G. W. Casilear. This position is that the loan evidenced by exhibit "I" (R., 20), this being the deed of trust to McKeldon and Timoney, securing the $3,000 note to F. A. Casilear is founded upon a valuable consideration, and that the sale to G. W. Casilear under this deed, exhibit "I," and which sale is evidenced by exhibit "L," is founded upon a valuable consideration paid, and that therefore George W. Casilear stands in the position of a purchaser for value paid.

From this it will be, and has been, argued that he being thus in the position of a purchaser for value, as distinguished from a volunteer, or from one standing in such a barren and express trust relation, as that created by the deed "K" to Leonard Mackall, of January 13, 1874, exhibit "K" (R., 24), is entitled, under the doctrines of equity applicable to laches, to protection not accorded to barren trust relations.

On the other hand, in the case of Leonard Mackall holding under the deed, exhibit "K," it is not pretended that he parted with any value. On the contrary, the deed under which he held from his father (R., 24–26) expressly states, in the concluding paragraph thereof (R., 26, fols. 58, 59), as follows:

> "In trust, notwithstanding, for the uses and purposes following, and none other—that is to say: to hold the same for the use and benefit of the aforesaid Brooke Mackall, Sr., and subject to his absolute control and disposal, and to sell and dispose of the same as the said Brooke Mackall, Sr., may in writing direct and require."

The legal title, therefore, in so far as that part of the property is concerned, which is covered by exhibit "K" (R., 24), was put in Leonard Mackall in *trust merely*, without any consideration paid therefor; and he, Leonard Mackall, stands in precisely the same relation to the present case as Brooke Mackall, Sr., would stand if he were yet alive.

In other words, these heirs of B. Mackall, Sr., stand in the position of a trustee under an express trust, who receives the legal title to property without consideration, to be used for a specific purpose (to wit, the exclusive benefit of B. Mackall, Sr.), as set forth in paragraph three (R., 2, fols. 3, 4).

Such is the distinction between the two demurrers.

We now turn to the law affecting the question of laches as applied to the Casilear conveyance, exhibit "L."

We have already seen that neither F. A. Casilear nor George W. Casilear are entitled to any of the protections given by equity to *bona fide* purchasers, and, therefore, that is out of the case. They stand in the position of parties taking property in defiance of the ownership of Brooke Mackall, Jr. as derived under exhibit "A" (R., 7), they knowing that he was the owner of the property, and had received from his father no value whatever therefor, but had been wronged in the conveyances under which the trustees, McKeldon and Timoney, claimed the power to make conveyances.

As to them, therefore, the question of laches goes back directly to the question as to what rule equity will apply to purchasers who buy with full knowledge of the gross frauds in which the trust, under which they purchased originated.

Our proposition is, that as to such purchasers in bad faith, against whom a bill is filed for recovery of the land they wrongfully hold, the most favorable rule of limitation, or of laches, which such a purchaser can claim is that which would be applicable at law in the case of an action of ejectment brought against them for the recovery of the same land.

Outside of all questions growing out of the facts named in paragraph eleven (R., 6, fols. 13, 14), we submit that the defendant, Casilear, cannot rely upon any limitation short of the twenty years prescribed by the statute of limitations for actions of ejectment.

This bill against defendants, by Brooke Mackall, Jr., was filed June 1, 1885. The deed exhibit "I," to the trustees from whom George W. Casilear purchased, bears date August 4, 1873. The wrong, therefore, inflicted by the making of the deed of trust to McKeldon and Timoney, was only eleven years and eleven months old at the time of the institution of this suit on the 1st of June, 1885.

Now, aside from all that is set up in said paragraph eleven, there is no bar in equity because of the rule of law which we now state.

Limitation Applicable at Law.

This suit is, as already remarked, when viewed in the light most favorable to defendants, virtually an action of ejectment in equity. To such suits the rule of law in chancery courts is that equity will not apply a shorter limitation to such a bill for the recovery of land, or the equitable title to land, than that which is applied to the analogous remedy in ejectment at law.

This is so even though the Court may reach the conclusion that the repudiation of the trust expressed in exhibit "B," by Brooke Mackall, Sr., and by his heirs, was an unmistakable repudiation, and was fully known to the *cestui que trust* during a period shorter than the limitation applicable, at law, to the analogous remedy by ejectment.

This, therefore, brings the present case within that rule of the cases in equity which is stated in 2 Story's Equity Jurisprudence, section 1520. After stating that, where there are *concurrent* remedies at law and in equity, and the remedy at law is regulated by a statute of limitations, there equity is *bound* by the limitation at law, citing Hayden *v.* Lord Ainsley, 2 Schoales & Lefroy, (Irish Chan.,) 607, 629, 630, the author proceeds:

> "In a great variety of other cases courts of equity act upon the analogy of the limitations at law. Thus, for example, *if a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation and apply it to* ALL *cases of relief sought upon equitable titles or claims touching real estate.*
>
> "Thus, for example, if the mortgagee has been in possession of the mortgaged estate for twenty years, without acknowledging the existence of the mortgage, it will be presumed that the mortgage is foreclosed, and that he holds by an absolute title. If the mortgagor has been in possession of the mortgaged estate for the like space of time, without acknowledging the mortgage debt, it will be presumed to be paid. If the judgment creditor has lain by for twenty years without any effort to enforce his judgment, and it has not been acknowledged by the debtor within that time, it will be presumed satisfied. And in *all* these cases courts of equity will act upon these facts as a positive bar to relief in equity." Citing—
>
> 1 Knapp, 229; 2 Young & Coll., 680; 3 Sumner, 152.

Hence, since this suit was commenced *before* the expiration of twenty years after the fraudulent deed of trust to McKeldon and Timoney of August 4, 1873 (R., 20), and since twenty years is the bar applicable to suits, for land, at law, therefore there is here no bar, no odds what was the nature of the repudiation of the trust, or what was the character of the complainants' knowledge thereof.

The rule that equity will adopt the limitation at law, in cases where the equity suit is analogous to a remedy at law, is stated by the Supreme Court in Hall *v.* Law, 102 U. S., 461. There the suit in equity was one to quiet title to certain real estate in Indiana; and the Court, upon the point as to the adoption by courts of equity of the limitation applicable, in analogous cases, at law, uses the following words:

> "Though the present case is in form a suit in equity—and as the bill asks for an injunction, it may be so treated—it is essentially a suit to recover the possession of land. The complainants are out of possession, and the defendant, or parties claiming under him, are in possession. The determination in favor of the complainants' title is only preliminary to a decree for the surrender of possession. If *not* a concurrent remedy with the common-law action of ejectment, it so *nearly resembles* the latter as to *justify the rule that in such cases the statute equally applies.*"

The case of Clark *v.* Boorman's Executors, 18 Wall, bottom of page 505, states the same rule, where the Court says:

> "It would seem reasonable that when the parties ask, in the alternative, for such relief as the Court can give, instead of the property, *the same rule of limitations should govern in courts of equity as would govern the courts at law.*"

In Perry on Trusts (1st ed., sec. 855), the author says:

"Where there is a statute bar at law, the same period, in analogy or obedience to the statute, is adopted in

> equity as a bar to equitable claims. * * * Lord Redesdale was of opinion 'that the statute *virtually included courts of equity*, and that it was a mistake to say that equity acts in analogy to the statute; it acts in *obedience to it*. Equity follows the law.' (2 Schoales & Lefroy; Irish Chancery, *supra*.) The same opinion has been held by other great judges in England and America."

Notes 3 and 4 to this section (855) fully present the cases establishing this doctrine, and include a large number of decisions by the Supreme Court of the United States.

It will, of course, not be claimed that since the doctrine is that equity will adopt the limitation applicable, in analogous cases, at law (where no surprise, mistake, concealment, fraud, or disability is disclosed), and will bar the case in equity if the analogous case would be barred at law, yet the case in equity will be barred *before* it would, in the analogous case, be barred at law. *Hence, all the authorities which hold the doctrine that equity follows the law applicable to the analogous case at law, are cases holding that the present action, for the recovery of these lands and the proceeds thereof, is not barred, because the action of ejectment would not be barred in the present.*

Upon this subject the language of the Supreme Court in the case of Michoud *v.* Girod, 4 How., 561, is directly and conclusively in point, not only upon the exact propositions now being considered, but upon other features of the case. The Court says:

> "In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. (Prevost *v.* Gratz, 6 Wheat., 481.) Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he will be barred in equity from

a wise consideration of the paramount importance of quieting men's titles, and upon the principle that *expedit reipublicæ ut sit finis litium.* Although the statutes of limitations do not apply to any equitable demand, courts of equity *adopt* them, or, at least, *generally* take the same limitations for their guide, in cases analogous to cases in which the statutes apply at law. (10 Ves., 467; 1 Cox, 149.) Still, within what time a constructive trust will be barred, must depend upon the circumstances of the case. (Boone *v.* Chiles, 10 Pet., 177.)"

In cases where there is, at law and in equity, strictly *concurrent* jurisdiction of the subject-matter of the action, and such subject-matter has applied to it a limitation at law, there equity holds itself *bound* by the limitation which is applied at law. (Wagner *v.* Baird, 7 How., 258; Gordon *v.* Kimmell, 99 U. S. R., 210.) But in cases where there is not a concurrent jurisdiction, and only an *analogy* between the remedy in equity and the one at law, there the rule is that equity will follow the limitation which applies at law, unless some strong equity requires a departure therefrom, and the departure may adopt a longer or shorter limitation accordingly as conclusive equities may demand. Still an immense multitude of cases show that a shorter limitation than that applicable at law will not be adopted, unless manifest and conclusive equities so require; and where actual fraud is shown, a shorter time is never adopted.

The considerations which we have gone over in regard to the demurrer of Casilear furnish, *a fortiori*, an answer to the demurrer of the heirs, so far as that is rested upon *laches*. The heirs were volunteers, in the sense that they paid no consideration for the deed "K" (R., 24) to Leonard Mackall, that deed being one leaving the full and real ownership (R., top page 26) in Brooke Mackall, Sr.

Rule as to Laches where there is Active Fraud.

Our question, therefore, so far as laches is concerned, as between the complainant and the heirs, is, in effect, when would a bar arise, in equity, between Brooke Mackall, Sr., and complainant, if this suit were against the father and his grantee, Hill?

In this case the bill alleges *actual, active, and intense* fraud on the part of the father as against the son, in converting the trust created by the exhibit "B" to his own private gain, and to purposes foreign to the objects of its making. This being so, the rule of law, regarding the doctrine of laches, is totally different from that applicable to the case of a purchaser for value, and where there was no *active* and *actual* fraud, on the part of the trustee, as distinguished from mere constructive fraud, such as buying at his own sale.

As to when a bar will arise in equity in such cases of "*active fraud*," we state our propositions as follows:

In cases where the trustee has been guilty of *actual* fraud, (as distinguished from the constructive fraud attributed to a purchase at his own sale, however honest,) there courts of equity give relief after the lapse of long periods of time, much longer than the period fixed in analogous cases by the statute of limitations.

The Supreme Court, in the case of Michoud *v.* Girod, 4 How., 561, on this subject uses this language:

> "In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief."
>
> Prevost *v.* Gratz, 6 Wheat., 481.

"There is no rule in equity which excludes the consideration of circumstances; *and in cases of actual fraud,* we believe *no case can be found in the books* in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, OR within *thirty* years after it has been discovered, or becomes known to the party whose rights are affected by it."

In the case of Brown *v.* Evans, House of Lords Cases, 257, 258, Lord Chancellor Cottonham stated the principle as follows, in regard to setting aside remote transactions on the ground of fraud.

"When much time has elapsed since the transaction complained of, there having been parties who were competent to complain, the Court will not, upon doubtful or ambiguous evidence, assume a case of fraud, although upon fraud clearly established *no lapse of time will protect the parties to it, or those who claim through them*, against the jurisdiction of equity depriving them of the effects of their plunder."

An additional view we now state (though quite kindred to the views already stated), to wit:

That the facts in this case make out, as against the two deeds to Hill, exhibit "D" (R., 11) and exhibit "H" (R., 18), as well as the other deeds based upon these deeds to Hill, the proposition that these deeds had their origin in the grossest *active* fraud as distinguished from constructive.

These averments have been already herein recapituated, and they include on the part of the trustee in the deed of trust "B" the following, namely: The trustee's getting from complainant, without a cent of consideration, certain notes to the father, gotten for the purpose of the support of him and his son, the complainant. These notes were never used for that purpose. A difference sprang up between the father and the son. After that difference had arisen, and after a lapse of *more than seven years*, and when the notes were barred by the statute of limitations, the father proceeds to use the barred notes and the deed of trust securing the same for his own benefit, he being trustee in the said deed of trust, and having taken the acknowledgment, as notary, of the deed to himself, he proceeds to make an arrangement with his own "instrument," Joseph B. Hill, whom he makes use of for the same purpose in making both the deed, exhibit "D," and the deed, exhibit "H."

He makes an advertisement of *three* days of the sale of the trust property, where the trust required an advertisement of sixty days. He makes the sale in the private apartments of the auctioneer, and not, on the premises, publicly. He makes the sale for no consideration. He conceals the sale from the beneficiary, his son. He makes the sale to Hill, but for his own benefit, instead of making it to himself, this in order to avoid the appearance of being the purchaser at his own trust sale. He receives from Hill no money, either for himself, or for his son. He never accounts to his son for a dollar of the money for which the property was bid off by Hill.

And these same facts, showing the most flagrant fraud, whereby, through a "contrivance," the son is defrauded out of the total value of the property covered by exhibit "D," is *also* re-enacted in the very next month in making the sale evidenced by exhibit "H." And these frauds, so entering into both deeds to Hill, are with all their poisonous effects, transmitted to, and destroy, the deed, exhibit "I," to the two trustees, McKeldon and Timoney, and the deed to George W. Casilear, exhibit "L," and the deed to Leonard Mackall, exhibit "K." Through these frauds the complainant is defrauded out of substantially all of the property covered by the deed of the 21st of December, 1863, evidenced by exhibit "A" (R., 7).

In view of such frauds as these, is it conceivable that a court of equity will apply a statute of limitations, against the recovery of these lands, *shorter* than that which would be applied in an action of ejectment for the recovery of the same lands?

In the light of the authorities now gone over, we submit that such a shorter rule of limitation applicable to such a case of intense and ruinous fraud is impossible.

And now to the authorities which we have already cited on this point we add the recent authority from this Court furnished by the case of Bryan *v.* Kales, 134 U. S. R., 136. There the Supreme Court refuses to apply a limitation shorter than that applicable at law to a case where the frauds, although quite gross, cannot be said to have equalled, in their severity, those set up in the present bill.

To these suggestions, in resistance to the application of the doctrine of laches to the present case, are to be added all the considerations set forth in paragraph 11 of the bill—considerations going to explain and excuse the delay that occurred.

They include the following considerations:

First. That from the beginning both the Casilears had *express*, as well as constructive, notice of the frauds entering into the conveyances "D" and "H," showing that Brooke Mackall, Jr., had got nothing for his land; that he was the owner thereof by virtue of the deed (exhibit "A"); that his father had himself taken, as notary, the acknowledgment of the trust to himself; that no advertisement was ever made such as required by the deed of trust; that no money was ever paid for either of the sales to Hill; that the purchase was made for the benefit of the trustee, etc.

Second. That the Casilears were expressly and in writing notified that the fraud involved in their purchase *would not be submitted to.*

Third. That said purchaser, Casilear, entertained and entered upon negotiations with complainant during these years of delay in bringing this suit, holding out hopes and promises of settling for the injuries inflicted by said frauds (see Thompson *v.* Ins. Co., 136 U. S., bottom of page 287); that they (the Casilears) never made any improvement on the lands so bought; that there was no material appreciation in the value of the lands during the delay in bringing this suit, and that they, during this period of delay, received large amounts by way of rents and profits of the property.

Fourth. As to the remainder of the property, to wit, that embraced by the deed, exhibit "K," that the father had, after his reconciliation with his son, the complainant, promised to make amends for the wrongs he had inflicted during the period of alienation; that he did, in fact, attempt to make, and, as far as was in his power, did make reparation by the deed to his son of February 28, 1880 (or February 27, 1880, 135 U. S. R., top of page 169); that, on the 7th of March, 1880, Brooke Mackall, Sr., died, this being a few days after the execution of the said deed of February 28, 1880, to his son; that on the 14th of February, 1882 (132 U. S. R., 169), the heirs of Brooke Mackall, Sr., brought a suit, amongst other things, for the purpose of setting aside said deed to complainant from his father of the 28th of February, 1880; that such suit continued to pend during three years of the delay in bringing this suit; that if the said attack upon the said deed of the 28th of February, 1880, should be *defeated* and the deed sustained, there was no necessity for bringing the present suit, as far, at least, as the heirs of Brooke Mackall, Sr., were concerned; and, if the deed should be defeated, then complainant would be *remitted to his rights in equity, whatever they might be,* under the deed to him, exhibit "A"; that no improvements were made by the heirs of Brooke Mackall, Sr., upon the lands covered by the deed, exhibit " K "; that no material appreciation in their value occurred during such period of delay, and that the heirs, under said exhibit " K," stood in no better position than their father would stand if living; and that such heirs had knowledge of all the frauds that entered into the title of their grantor, Hill, as above set forth.

When all these considerations, named under the last four preceding paragraphs, are added to the considerations, as above set forth, we submit to the Court that this is not a case where the Court will find the complainant guilty of such laches as shall operate as a bar to this suit.

No Estoppel by Decree.

One other ground of the demurrer, as set forth in the demurrer of the said heirs (R., 30, fol. 68), it is proper to here specifically notice, to wit, that which alleges that it appears, by the face of the bill, that the title to the lots there named "has been adjudged to and decreed to these defendants."

This part of the demurrer, we suppose, has reference to the statement of the bill, which says that "a decree was made adjudging the same" (to wit, the deed of the 28th of February, 1880, to complainant from his father) "to be void" (R., 6, fol. 14). This statement of the demurrer, at the top of page 30 of the Record, that the bill shows on its face that the title to said lots had been adjudged and decreed to defendants is not true as a matter of fact. All that the face of the bill shows as to this is that the *father's deed* of the 28th of February, 1880, had been declared inoperative, and this is in exact accordance with the record facts in the case. No decree was ever made, nor does the bill show that any decree was ever made, adjudging and decreeing the *title* of Brooke

Mackall, Jr., in said lots to be bad. It only decrees that he derive no title by virtue of the deed of February 28, 1880. This, therefore, left his title good as derived under the deed, exhibit "A," unless the defendants can, in this case, destroy the title derived by such deed, exhibit "A," through the fraudulent deeds to their grantor, Joseph B. Hill.

We believe that the points now gone over cover the entire substance of the issue raised by this demurrer.

As already remarked, if anything material is omitted in this brief, and it should become necessary to do so, counsel for complainant will endeavor to supply the omission in the oral argument.

Samuel Shellabarger and
J. M. Wilson,
Solicitors for Complainant.

DEC 1 18
JAMES H. McKENN
CL

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 97.

BROOKE MACKALL, Jr., Appellant,

vs.

GEORGE W. CASILEAR, et als.

Appeal from the Supreme Court of the District of Columbia.

Brief in reply to parts of Brief in behalf of Heirs of Brooke Mackall, Sr.

By SAMUEL SHELLABARGER and
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Supreme Court of the United States.

OCTOBER TERM, 1890. No. 97.

BROOKE MACKALL, JR., APPELLANT,

vs.

GEORGE W. CASILEAR ET AL.

Appeal from the Supreme Court of the District of Columbia.

In addition to what is contained in the printed brief for appellant, we notice a few points found in the opposing brief for the heirs. One of these is that which relates to the validity of the deed exhibit "B," wherein Brooke Mackall, Sr., sustains the character of trustee, beneficiary, and, also, that of the officer taking the acknowledgment of the deed to himself.

Our first point, touching this deed, is that it is inoperative as an actual conveyance of the legal title for the reason that it is a deed not acknowledged as required by the laws of the District of Columbia in force at its date, May 5, 1866.

That a party cannot take an acknowledgment of a deed to himself where he is beneficially interested in the grant is thoroughly settled by reason and by the following authorities:

In West *v.* Krebaum, decided 1878, 88 Illinois, 266, on this point, the Court says:

"Although the trust deed contains a formal release of the homestead right, that will not suffice under our statute without the acknowledgment of the deed; and it is alleged against the release here that the deed was not acknowledged * * * that the grantee in the deed, himself, John J. Fletcher, took and certified the acknowledgment, and that such acknowledgment is void."

Citing—

Hammers *v.* Dole, 61 Illinois, 370.
Groesbeck *v.* Seeley, 13 Michigan, 328.
Withers *v.* Baird, 7 Watts, 227.
Wilson *v.* Traer & Co., 20 Iowa, 231.
Goodhugh *v.* Berian, 2 Sanford's Ch., 630.

In the case of Groesbeck *v.* Seeley, 13 Michigan, 330, the Court held that the head note expresses this:

"A grantee in a deed, or one for whose immediate use it is made, cannot take an acknowledgment thereof."

In the case of Hammers *v.* Dole, 61 Illinois, 307, 308, the head note expresses the decision on this point, thus:

"A chattel mortgage acknowledged before one of the mortgagees who is a justice of the peace, is void as to other mortgage creditors, for it is against the policy of the law that any officer should perform either a ministerial or judicial act in his own behalf. It would be no sufficient answer to this that such mortgagee was the only justice in the township."

In Green *v.* Abraham, decided 1884, 43 Ark., 420, the same doctrine is held, which the body of the opinion, pp. 422, 423, thus states:

"The acknowledgment having been taken and certified by an officer who was a party to the deed, did not entitle the instrument to record, and the record of it imparted no notice to subsequent purchasers or encumbrancers."

Citing—

Wilson *v.* Traer, 20 Iowa, 231.
Beeman *v.* Whitney, 20 Maine, 413.

Withers *v.* Baird, 7 Watts, 237.
Brown *v.* Moore, 38 Texas, 645.
Stevens *v.* Hampton, 46 Mo., 404.
Hammers *v.* Dole, 61 Ill., 307.

The same principle is stated in Davis *et al.* *v.* Beazley *et al.*, decided 1881 (75 Va., 495), in the following words:

> "It is a fundamental maxim in our jurisdiction that no man can be a judge of his own case. Under the influence of this principle it has been frequently held that a grantee in a deed or a beneficiary under it is not allowed as an officer to take an acknowledgment of the deed by the grantor, with a view to its registration. The certificate of such an acknowledgment is invalid as authority to admit the deed to record, and, hence, a recordation based upon it is without effect as notice by construction under the registration laws."

Citing—

Groesbeck *v.* Seeley, 13 Mich., 329.
Beeman *v.* Whitney, 20 Maine, 413.
Wasson, adm'r, *v.* Connor, trustee, 54 Miss., 351.
Brown *v.* Moore, 38 Texas, 645.
Broom's Legal Maxims, 117.
Bower's Adm'r *v.* Bowers, 29 Grattan, 697.

In Withers *v.* Baird, 7 Watts, 227, decided 1838, the head note states thus:

> "A magistrate, bound to make title by a conveyance by a third person, is not competent to receive the acknowledgment of the grantor's wife."

Regarding the acknowledgment in that case, Chief Justice Gibson (p. 228) says:

> "But the acknowledgment was palpably insufficient to bar the dower of Baxter's wife. The office of a magistrate in respect to private examination is a judicial and delicate one; entrusted with the business of inspection of the wife's knowledge and will, he should be superior to all

exception on the score of impartiality. When he is bound to procure his conveyance, his inducement to abuse his trust is as strong as if the conveyance were made to himself, and it would not be permitted that his judicial functions should be exercised in his own case."

In 32 American Decisions, 754, will be found a note citing the almost innumerable and quite uniform authorities to the same effect, as above stated. See, also, the cases cited in American and English Encyclopædia of Law, vol. I, p. 145, where the same doctrine is laid down in the text, and is supported by numerous authorities.

This paper being, therefore, not acknowledged in a way tolerated by the general principles of law applicable to this particular transaction, we next turn to the question whether a deed signed, sealed, and delivered, as exhibit "B" was, is valid and operative as a conveyance of the legal title which it purports to convey. This question is thoroughly settled by the decisions of this Court, and the decisions of the Courts of the District of Columbia, holding that the deed is inoperative for the purpose of passing the legal title.

The following cases make this general proposition plain and indisputable:

This Court in the case of VanNess *v.* United States Bank, 13 Pet., 21, decides what the head note expressed thus:

> "The acts of the Assembly of Maryland, prescribing the mode in which deeds should be acknowledged for conveyances of real property *were adopted* by Congress" in the first section of "the act assuming jurisdiction in the District of Columbia, of the 27th of February, 1801" (2 Stats., 103).

In that case it was contended (p. 21) that the acknowledgment of the deed there in question from Walter Smith to Benjamin Stoddard was defective, and the deed inoperative, because it did not appear, in the certificate of acknowledgment endorsed upon the deed, that the persons before whom it was made were at the time justices of the peace of Washington County, and it was insisted that this omission cannot be supplied by parol.

Regarding this contention Chief Justice Taney, in the opinion of the Court by him, says:

> "This question depends upon the construction of the *acts of Assembly of Maryland which prescribe the mode in which deeds shall be acknowledged for the conveyance of real property. Those acts of Assembly having been adopted by Congress in the act assuming jurisdiction, together with the other laws of Maryland then in force, we perceive nothing in the Maryland acts of Assembly which requires justices of the peace or other officers to describe in the certificates their official characters.* * * * Such a statement is not made necessary by the Maryland statutes. And whenever it is established by proof that an acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity."

See this case cited and commented upon in Schultz *v.* Moore, 1 McLean, 525.

There is, we submit, therefore, absolutely no possible question about the proposition that the laws of Maryland, in so far as they, at the making of any particular conveyance, remained *unchanged*, and which were in force at the date of the act of 1801, continued in force and governed the making of all deeds in this District, so far as related to the matter of acknowledgment.

This, therefore, remits us to the question what was the character of the statutes in force in this District in 1866, the date of the deed exhibit "B," so far as related to the necessity of their being *acknowledged* in order to pass the legal title?

We do not controvert the proposition that at common law, in the absence of statutes controlling the matter, a deed duly made purporting to grant the legal title, and which was signed, sealed and delivered, passed the legal title without an acknowledgment, when the party making the deed was recognized by the common law as *sui juris*.

Whilst this is true, it is equally settled by the decisions of this Court, and, for that matter, of all others, that where the local statute in force at the time and place where the deed is made, makes the acknowledgment of the deed, according to the requirements of the statute, to be a condition precedent to the passing of title, there no title passes in the absence of such an acknowledgment as the statute requires.

This is decided in the case of Greenleaf *v.* Berth, 6 Pet., 302, 313, 314; also in Denn *v.* Reed, 10 Pet., 524, etc.

In the case of Greenleaf *v.* Berth, this Court, on this point, says (6 Pet., 313, 314):

> "By the laws of Maryland (with certain exceptions not necessary to be mentioned), *no conveyance is sufficient to pass any estate of inheritance or a freehold in lands or any other estate above seven years except the deed of conveyance be in writing and acknowledged in the general court, or before a judge thereof, or in the county court, or before two justices of the peace of the county where the lands lie, &c., &c., and be enrolled in the records of the county or of the general court, within six months after the date of the act.* (See act of 1715, c. 47; act of 1794, c. 7; act of 1789, c. 3.) * * * *Unless, then, some exception can be found which exempts these assignments from the general rule to enroll them, renders them, in a legal sense, mere nullities and incapable of passing any title to the land in controversy.*"

This case, it must be observed, related to lands in the city of Washington.

In the case of Wood *v.* Owens *et al.*, 1 Cranch, 239, 251, an interpretation of the Maryland statutes affecting this matter of acknowledgments came under review; and it was there expressly held that a deed executed according to the requirements of the common law by making, signing, sealing and delivering, was a deed "made" within the meaning of that word in the bankrupt law of May 30, 1800; yet it could not, under said Maryland statutes, *become operative to pass title until acknowledged according to said laws.* The words of the Court upon this point (p. 251) are as follows:

> "Upon the most mature consideration of the subject, the opinion of the Court is, that the words used in the act of Maryland, which have been recited, considered the instrument as a deed, *although inoperative till acknowledged and enrolled.*"

The words of the Maryland statute of 1766, and which are here referred to in the opinion of the Court, set forth at page 251, are as follows:

> "That after the first day of May next, no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, *shall pass or take effect*, except the deed or conveyance by which the same shall be intended to pass or take effect shall be *acknowledged* in the Provincial Court, or before one of the justices thereof in the county court, or before two justices of the same county where the lands, tenements or hereditaments, etc., conveyed by such deed or conveyances do lie, and be, also, enrolled, &c., within six months after the date of such deed or conveyance."

This is the statute relating to acknowledgments of deed which was re-enacted by the act of February, 1801, and which remained in force at the time of the execution of exhibit "B" except in so far as modified by acts of Congress enacted after 1801.

The statutes enacted by Congress do not change the original law in force in the District, as above shown (and as re-enacted by the act of Congress of 1801), except as to the mode of acknowledgment. They leave absolutely in force the provision of the said acts making an acknowledgment a condition precedent to the transfer of the legal title, but make changes as to how that acknowledgment may be made. They are noted in the margin of the Revised Statutes of the District of Columbia, at section 441 *et seq.* They, as already remarked, simply change the law as to how and before whom the acknowledgment shall be taken, but not as to the necessity of an acknowledgment as a condition precedent to the passing of title. The sections on this subject found in the Revised Statutes for the District of Columbia have, from time to time, been modified by Congress; as, for example, in the act of March 3, 1879 (20 Stats., 353), validating deeds acknowledged before consuls, &c.; the act of April 29, 1878 (20 Stats., 39), which last act repeals sections 446 and 447 of the Revised Statutes of the District of Columbia, and substitutes therefor a section, the effect of which is to enact that deeds of trust, mortgages, and conveyances, entitled under existing laws to be recorded, shall take effect, as to creditors and *bona fide* purchasers, from the time the "instrument in writing shall, after having been acknowledged, proved, or certified, as the case may be, be delivered to the Recorder of Deeds for record, and from that time only."

It is thus, we submit, made plain to a demonstration that deed exhibit "B" was inoperative to pass the legal title to Brooke Mackall, Sr., and therefore all conveyances dependent for their validity as transfers of title upon exhibit "B" are nullities, so far as their effect upon the legal title is concerned.

Before leaving this point it is appropriate to remark that the construction of the existing statutes regarding the acknowledgments by the courts of the District has been as above cited. For example, in the case of Cowan *v.* Beall, 1 MacArthur, 270, it was taken for granted on both sides and by the Court that, in that case, the deed without a proper acknowledgment was invalid as an attempt to transfer title, and the Court held that the deed acknowledged before a justice of the peace of the State of Maryland but who was not authorized by law to take acknowledgments of deeds in the District of Columbia is "defective and void."

The same thing is recognized as the law in the case of Black *v.* Aman, 6 Mackey, 131, opinion by Bingham, C. J.

We next come to the matter as to what the consequences are in the present case which result from the fact that no legal title passed in virtue of deed exhibit "B."

Having shown that the legal title to all the lots in controversy, except those which are embraced in the deed of July 14, 1868, exhibit "F," by complainant and others to Louis Brand (R., 14), namely, lot 15, square 41, and lot 5, square 43, remained, during all the years since the making of the conveyance exhibit "B" in the complainant, we are brought to the practical question, what effect, if any, has that fact upon the plaintiff's remedy in the present case?

Our reply to this question is, that it has vital effect upon not only the *merits* of the defense, but, also, upon the matter of *laches*. If, under the facts and conditions of the present case, it was *competent* for the complainant, though not in possession of the land in controversy, which is not embraced in exhibit "F," to bring this suit, then to make out a defense to the present action so far as relates to all the lands in controversy (save said lots 15, square 41, and 5, square 43), *it will be necessary for them to show that they are entitled to have a decree of specific performance, or some decree equivalent to that, transferring to them the legal title now remaining in complainant.*

It is a perfectly familiar doctrine regarding affirmative relief, in the nature of specific performance, that this is not an *absolute* right in equity in any case, and always rests in the sound legal discretion of the court; and, further, that it will never be granted, but the parties be left to their remedy at law, in every case where the contract to be enforced is a hard one, or where it would be, for any cause, inequitable to enforce it.

This will be found decided by this Court in such cases as—

Willard *v.* Taloe, 8 Wall., 557.
Marble Company *v.* Ripley, 10 Wall., 339.
Colson *v.* Thompson, 2 Wheat., 336.
Preston *v.* Preston, 95 U. S., 200.
Bank *v.* Lynn, 1 Peters, 376.
Cathcart *v.* Robinson, 5 Peters, 256.
Brashier *v.* Gratz, 6 Wheat., 528.

Pomeroy, sec., 405, states this doctrine thus, speaking of enforcing contracts specifically:

> "It" (the contract) "must be upon a valuable consideration. It must be reasonably certain in as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be, in general, mutual in its obligation and in its remedy. The contract must be free from any fraud, misrepresentation, even though not fraudulent, mistake, or illegality. The elements which peculiarly affect the *equitable* character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal, and just in its terms and in its circumstances. The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive."

The cases cited by the author to these various propotions are of highest authority and almost innumerable. Such being the thoroughly settled rule, in courts of equity, regarding the matter of specific performance, it seems impossible to doubt that a court of equity will not compel Brooke Mackall, Jr., to part with his legal title to the property involved in this case (and not embraced in the deed exhibit "F") under the conditions and circumstances of flagrant fraud, in which all the pretended rights of the defendants in this case originated—will not compel him to part with that legal title, either owing to the *merits* of the defendants' claim thereto, or owing to any lapse of time that has occurred in bringing the present suit, short of the twenty years' limitation applicable to actions of ejectment.

And besides this, the legal title being, all the while, in the complainant, and the defense being one seeking to wrest from him the legal title, by means of the decree of this court, it results that the rule of limitation, *applicable at law* to actions to recover the legal title, must (in obedience to such authorities as are named in our brief, for example, in Hill *v.* Law, 102 U. S., 461; Clark *v.* Brooman's Exec., 505; Perry on Trusts, sec. 855) be applied to the present case.

Turning next to the question whether it was competent to bring the suit, in so far as it relates to the premises not embraced in said exhibit "F," our proposition is this: that, although the complainant is not in possession, yet the suit he brings is one wherein a considerable part of the property sued for is property as to which he has parted with the legal title under the deed exhibit "F," and as to which he must, therefore, resort to a court of equity to recover that part of the land.

This being so as to lot 15, square 41, and lot 5, square 43, and complainant having, as to these, no remedy except in equity, and the wrongs of which he complains, to wit, the frauds entering into the making of the deeds to Hill, exhibits "D" and "H," *being wrongs that enter into and affect alike and in common all the property sued for in this case, it, therefore*, results (owing to this unity of wrong complained of as one affecting both that part of the property as to which the legal title remains in complainant, and that covered by exhibit "F," to wit, lot 15, square 41, and, also, lot 5, square 43) that to avoid multiplicity of suits, the complainant may sue for removing the cloud from his legal title as to the lots in controversy, except said lot 15, square 41, and lot 5, square 43, as well as to have a decree avoiding the said deed exhibits "D," "H," and "F," and, also, the deeds based upon either of those conveyances.

About all, if not all, of those classes of cases where the jurisdiction in equity is maintained in order to avoid multiplicity of suits are cases where there is a remedy at law; and the very ground of jurisdiction in equity is that the remedy at law is inadequate, owing to the multiplicity of suits which such remedy involves.

Pomeroy's Equity Jurisdiction, section 269, after a most elaborate discussion of the cases in which the jurisdiction of courts of equity depends upon the avoidance of a multiplicity of suits, sums up the discussion (vol. I, p. 294) in the words quoted below in answering the objection to equity having jurisdiction where there is an *absence* of a common title, or a community of right, or of interest in the subject-matter. He says, speaking of cases where these elements are absent:

> "The jurisdiction *has* been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue, and perhaps in the kind of relief, and the single decree has, without any difficulty, settled the entire controversy, and determined the separate rights and obligations of each individual claimant.
>
> "The same *principle*, therefore, embraces both the technical bills of peace, in which there is confessedly a common right or title or community of interest in the subject-matter, as also those analogous cases over which jurisdiction has been exercised, in which there is no such common right or title or community of interest in the subject-matter, but only a community of interest in the question involved and in the kind of relief obtained."

In section 1394, volume 3, the same author states the same rule in these words, speaking of the *two* classes of cases in which bills to "quiet title," or " bills of peace," are entertained in equity. He says:

> "In the first class the original jurisdiction to maintain 'bills of peace,' of 'bills *quia timet*' properly so called, will only be exercised when the claims of the different individuals have *some community of interest in the subject-matter, or arise from a common title; but the jurisdiction has been enlarged so as to entertain analogous suits where the community of interest is, in that respect, similar to the questions involved, or the kind of relief demanded.*"

Referring to the cases cited in Secs. 273, 274, in Vol. 1 of the same work; also numerous cases cited in Note 1 of Sec. 1394.

And see Dodge v. Briggs et al. 27 Fed. Rep. 160-169. and cases cited.

In the light of these facts and of these authorities, we insist that, without being driven to the action of ejectment at law, as to the property here involved (except lot 15, square 41, and lot 5, square 43), and without being in actual possession of the property not covered by exhibit "F," we may, because of the unity of wrong which exists between both deeds to Hill, and all deeds thereunder made, and the unity of wrong doing out of which the said deeds sprang, resort to one bill in equity for the correction of this wrong, *common to all the property in controversy*, and may, in that bill, remove the cloud which is upon the title to said lots other than 15, square 41, and lot 5, square 43, and may set aside the deeds which have sprung out of the deed exhibit "F," and, also, all the other deeds named in the prayer of complainant's bill.

Another suggestion is, in this connection, appropriate in answer to a point in the brief of the heirs. It is that, so far as relates to the property embraced in exhibit "F,' this is in no sense a bill to quiet title, technically so-called, or a bill to remove a cloud, and where *possession* is necessary to maintain the bill.

It is, on the contrary, as to ~~all the lots involved other than~~ the two lots 15 and 5, a bill to set aside a legal title conveyed, on account of the fraud that entered into the making thereof, and in such case no *possession* is necessary in order to maintain the equitable jurisdiction to annul the fraudulently-obtained legal title.

We now turn to another point in the brief of the heirs. That point is stated on pages 7 and 8 of the brief, where it is alleged that, because Brooke Mackall, Jr., accepted the deed from his father of February, 1880, and which was adjudged void, he thereby *waived* any title which he had, either at law or in equity, prior to the making and accepting of the said deed of 1880.

This, as seems to us, is a point about which useful discussion is rendered impossible, owing to the palpable error which the proposition involves. It is precisely equivalent to saying that if "A" holds title to lands which is really perfect, but which title is so clamored against by " B " as to induce "A" to accept a quit-claim title from the party, " B," making the clamor, there, by taking such quit-claim deed from " B," "A" has forfeited his prior and perfect title, provided it should turn out that, for any reason, the quit-claim of " B " is void; either, for example, by reason of the fact that " B " had become *non compos* when he made the quit-claim, or made it under the influence of mistake, or because the deed was defective in some technical respect which prevented it from passing title.

This illustration is, we submit, the precise equivalent, in its legal aspects, of the point insisted upon at pages 7 and 8 of the brief of the heirs. It is a proposition which we will not attempt further to consider.

The proposition on page 9 of the brief of the heirs, that our title has been adjudged defective in the courts, and that this is so admitted in complainant's bill (R., 6, fol. 14), is replied to in the opening brief for the complainant (pp. 32 and 33). The point is one much like that stated on pages 7 and 8, about a "*waiver*" arising out of the acceptance of the deed of February, 1880. It is a point which says that because a decree has said that that deed of 1880 was inoperative, without stating why it was inoperative, and which may have been because of the incompetency of the grantor, or his mistake, or because the deed was improperly executed, that, therefore, a decree adjudging that quit claim, made simply to remove doubts and quiet the preceding title of the complainant, void is a decree destroying such preceding title existing in the complainant independently of the said deed of February, 1880, and this although not a word was said, in the case decreeing the deed of 1880 void, about such prior title.

This position seems to us as plainly wrong as the one to which we have just alluded, and which is stated on pages 7 and 8, and we, therefore, refrain from further discussion of it.

We now turn to another point in the brief for the heirs, and the last one we will notice in this brief in reply. At page 13 of said brief, it is insisted that Joseph B. Hill was an indispensable party defendant in this case.

To this we reply, first, that nothing is asked as against Hill. He is presented in the bill as a mere "figure-head," or tool of Brooke Mackall, Sr.; no covenants of his are outstanding; no money of his ever appears to have been paid, and none received, by him, on account of any conveyance in the case. He is, therefore, an unnecessary party.

But if we were mistaken in this, still this point is not well taken, because taken in this Court *for the first time*, and, therefore, waived.

This is decided by this Court in the following cases:

Mechanics' Bank *v.* Seaton, 1 Pet., 306.

Livingstone *et al.* *v.* Woodworth *et al.*, 15 How., 546.

Cary *et al.* *v.* Brown, 92 U. S., 171.

Kittredge *v.* Race *et al.*, 92 U. S., 116, 119.
McBirney *v.* Carson, 99 U. S., 567.

There are no other parts of the opposing brief which we care to further notice, than as noticed in our opening brief, and in the oral argument which we have submitted.

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IN THE

Supreme Court of the United States.

No. 97. October Term, 1890.

BROOKE MACKALL, Jr., Appellant,

vs.

GEORGE M. CASILEAR, et al. Appellees.

BRIEF FOR DEFENDANTS CASILEAR, APPELLEES.

J. J. DARLINGTON, Solicitor.

MILANS, LAW PRINTER, 519 7TH STREET, N. W., WASHINGTON.

money thereon for the use of complainant and himself, but that no money was in fact borrowed thereon, and that seven years thereafter, in pursuance of a scheme to obtain complainant's said property without paying anything for it, said Brooke Mackall, Sr., advertised it three days, instead of sixty as required by said deed of trust, without complainant's consent or knowledge, and nominally struck it off to one Joseph B. Hill, but really for the benefit of Brooke Mackall, Sr., no money in fact being paid, but the property being conveyed to Hill.

Second. That on July 14th, 1868, he executed a conveyance of lot 15, Square No. 41, and lot 5 in Square No. 43, to Louis Brand, to secure his note of two thousand dollars, to Brooke Mackall, Sr., which note, also, was without consideration, given to enable Brooke Mackall, Sr., to borrow money for the benefit of both parties, none, however, being in fact borrowed thereon; and that, in pursuance of a like scheme to obtain complainant's property, said Mackall, Sr., caused Brand to advertise it four times only, instead of three weeks as required by the deed of trust, without complainant's consent or knowledge, and the same was nominally sold and was conveyed to said Joseph B. Hill, at the nominal sum of two thousand dollars, no money being in fact paid, and said Mackall, Sr., being the real purchaser.

Third. That six days after the date of the last named deed, namely, on the 4th day of August, 1873, Hill conveyed subdivisions 2 and 3 of lot 5 in Square 43, acquired under the second of the above deeds of trust, and two parts of lot 12 in Square 56 and lot 17 in Square 76, acquired under the first of the said deeds of trust, to McKelden and McTimoney, trustees, to secure a note of said Mackall, Sr., for three thousand dollars, to one F. A. Casilear, who, together with said trustees, had notice by the record and otherwise of the defects of title alleged; and that in October, 1874 said trustees sold and conveyed the said property under the said deed of trust, after default, to the defendant, George W. Casilear, two thousand seven hundred and twenty-two dollars and ninety-five cents, said Casilear having notice, at the time of the sale, of the defects alleged, and of complainant's claims in relation thereto.

Fourth. That the remainder of the property conveyed to Hill under the said deeds of trust as above stated was by him on the 13th day of January, 1874, conveyed to Leonard Mackall as trustee for Brooke Mackall, Sr., subject to the absolute control and disposal of the latter; and that the said Brooke Mackall, Sr., having departed this life on the 28th day of February, 1880, said property is claimed by the complainant's said brothers and sisters as the heirs and devisees of said Brooke Mackall, Sr., their father.

Fifth. That, as to the defendant Casilear, "some of the reasons for the delay" in attacking the conveyances in question are, that he, the complainant, "at all times had protested against his claim, notifying him at the time of his purchase that he should not submit to the sale, and he has since then been engaged in negotiations from time to time which he has hoped would result in a settlement and adjustment of their differences in regard to the property held by him;" and that said defendant has received "large amounts by way of rents and profits, and has made no substantial improvements thereon." As to the remaining defendants, the reasons assigned for delay are that, soon after the execution of the deeds in 1874, said Brooke Mackall, Sr., and the complainant became reconciled, and shared in common the benefit of all property possessed by either; that said Brooke Mackall, Sr., promised to rectify all that was wrong in the conveyances complained of, to the best of his ability, which assurance was relied on by complainant, and was satisfactory to him; and that the said Brooke Mackall, Sr., in February, 1880, pursuant to said promise, did execute a re-conveyance to complainant of all his interest in said property, which conveyance, however, was attacked by his brothers and sisters, and was by the Supreme Court of the District of Columbia adjudged void as to the property claimed in the Bill, the litigation over the same having been pending until a short time prior to the filing of said Bill.

The Bill prays that the two conveyances to Hill, and all deeds, instruments and claims of title under the same, be decreed null and void; that complainant be decreed to be the owner of all the property described therein, free and clear of all claims and demands of the defendants; that an account of the rents and profits received by the defendants be taken in favor of complainant, and for general relief.

The defendants Casilear demurred to the Bill for multifariousness, and, also, upon the following ground:

> "That it appears upon the face of the Bill that the complainant has been guilty of such laches, unexplained, or insufficiently explained, as disqualifies him from maintaining his said bill in a court of equity as against these defendants at this late day."

The other defendants also demurred for multifariousness, among other causes; and after argument upon that point only, a decree was passed dismissing the Bill as to the said defendants. Thereupon, the cause coming on for further argument, upon the ground of laches, the court in special term "adjudged complainant and decreed that any rights which the ~~company~~ may have had in the property conveyed by McKelden and McTimoney, trustees, to the defendant, George W. Casilear, described in the Bill, are forever barred by the laches of the said complainant; and it is thereupon further ordered that the Bill be, and the same hereby is, dismissed."

By stipulation, made after the decree, to avoid the delay of an amendment, it was agreed that the Bill might be read as if amended by stating that the complainant had no knowledge of the sales to Hill at the time of his conveyance to McKelden & McTimoney; that the property sold by them to Casilear was worth $7,500; that the will of Brooke Mackall, Sr., leaves only one dollar to complainant, giving the rest of his estate to his other children, and that the "negotiations" relied on as explanatory of the delay in the proceeding against Casilear were carried on "orally and by mutual correspondence in writing."

The decrees of the special term were affirmed by the Court in General Term, from which affirmance the present appeal to this court, was taken by the appellant.

POINTS AND AUTHORITIES.

This brief, submitted on behalf of the defendants, Casilear, will be confined to the question of laches.

Complainant's case is, that nineteen years before bill filed in one instance, and seventeen years in the other, he conveyed real property to secure notes executed by him for the purpose of borrowing money partly for his benefit, but on which no money was ever borrowed; that, twelve years before suit brought, no steps having been taken in the intervening seven years to have the abortive trusts released, the trustee, with intent to defraud him of his said property, sold it, after advertisement for less than the prescribed time, nominally to one Hill but really to himself; that, eleven years before suit brought, the property was again sold under a deed of trust to secure a debt of Brooke Mackall, Sr., the complainant being present at the sale; that immediately thereafter, the complainant and his father, the trustee complained of, became reconciled to each other, lived together, and shared all their property in common (record, p. 6, paragraph 11), the father making a conveyance of all his property to complainant prior to his death, and that, although the father, the only party against whom fraud is sought to be imputed, lived for six years after the last of the acts complained of, neither during that period, nor for five years thereafter, were any steps taken to impeach his acts, or to attack any of the conveyances now sought to be annulled.

The only explanation of this inaction offered in the Bill as filed was, the allegation that the complainant had been "engaged in negotiations from time to time which he had hoped would result in a settlement and adjustment of their differences in regard to the property;" and after the sufficiency of this explanation had been objected to by the demurrur, and, upon argument, denied by the court, the only amendment of it which it is found possible to make is, the allegation that the "negotiations" were carried on "orally and by mutual correspondence in writing." There is no averment that the delay was at Casilear's request or instance; that he ever promised any settlement or adjustment, or was in anywise responsible for complainant's alleged hopes in that regard; or that the alleged "negotiations" at any time amounted to anything more than an occasional assertion of claims by the complainant, and the repudiation of them by the defendant.

Upon these facts, as disclosed by the Bill, the single question to which it is thought necessary to invite the attention of the court, is, was not the defendant's delay in seeking the aid of the court, under the circumstances disclosed, such *laches* as bars his right to the relief sought, at this late period?

Upon this question, it may be useful to state, concisely, the allegations of fact which the Bill invites the Court to investigate. These are, substantially, the following:

(*a.*) That two promissory notes given by complainant nineteen years before Bill filed, aggregating about six hundred dollars, secured by a deed of trust upon his property, to a party now dead, were without consideration.

(*b.*) That another note for two thousand dollars similarly secured, given by him seventeen years before Bill filed, to a payee now deceased, was in like manner without consideration.

(*c.*) That, at a sale under the said deeds of trust made twelve years before Bill filed, the property was advertised for three or four days only, instead of for the time prescribed in said deeds, and that, at the sale under the first of said deeds, the purchaser was merely the agent of the trustee, now deceased.

(*d.*) That the complainant had no knowledge of the said sales until after the purchaser had obtained a loan secured by deed of trust upon the property, but that the lender did have notice of the alleged defects in said sales, "by the record and otherwise."

(*e.*) That the defendant, purchaser of said property at a sale under the last mentioned deed of trust, made eleven years before Bill filed, had notice of said alleged defects at the time of his purchase.

To the foregoing may be added the following circumstances which the Bill shows to have existed, namely:

(*a.*) The payee of the alleged notes lived fourteen years after the execution of the first two of them, and twelve years after the execution of the third, without any proceeding being instituted by the complainant, in his lifetime, to establish the alleged fact that they were without consideration.

(*b.*) That the trustee under the first of said deeds of trust lived seven years after the alleged irregular and fraudulent sale made by him, and six years after knowledge thereof on the part of the complainant is affirmatively shown by the Bill, without the institution of any proceeding in his lifetime seeking to establish the fact of such irregularity or fraud.

(*c.*) That no attack upon the *regularity*, fairness or validity of the sale under the second of said deeds of trust was made during the lifetime of the trustee who made the same, eleven years before Bill filed.

(*d.*) That, within a very short time after the matters complained of, the complainant "became reconciled" to his father, the only party charged by the Bill with wrong-doing in either of the transactions, and up to the death of the latter, six years later, resided with him, sharing with him in common the benefit of all his property, including, of course, the three thousand dollars borrowed from the defendant Casilear's father, upon the security of a title resting upon the conveyances now sought to be annulled.

These allegations of facts and circumstances, it is submitted, not only do not show, but plainly negative, the "conscience, good faith and reasonable diligence" on the part of the complainant which are essential to entitle him to the aid of a court of equity.

That the statute of limitations does not in terms apply to courts of equity; that the latter, nevertheless, regard themselves as equally bound with courts of law by that statute, in all cases of concurrent jurisdiction, and that, in cases where the jurisdiction is not concurrent, courts of equity will usually act upon the analogy of the statute, are now familiar rules of equity jurisprudence.

Under the latter of these rules, it was contended below on behalf of complainant, and will doubtless be argued here, that in suits affecting real property, the claimant is entitled to twenty years within which to file his Bill, and that no lapse of time short of twenty years is sufficient to constitute such laches as will bar action. In other words, that the adoption of the analogy of the statute is in the nature of an *enabling* rule, protecting, instead of restraining, the right of action for at least the full period of twenty years.

On the contrary, we contend that long before the enactment of the statute of limitations, and quite independently of it ever since, long and unreasonable delay in seeking its aid was and has continued to be fatal to every claimant in a court of equity, and that what is long and unreasonable delay is a question determined by the nature and circumstances of the case, and not by the arbitrary period prescribed by the statute as the largest which should be tolerated by the courts of law.

"From the earliest ages, courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims; especially where the legal estate has been transferred to purchasers without notice." Elmendorf *vs*. Taylor, 10 Wheat., 168.

"This doctrine is ably discussed in the case of the Marquis of Cholmondeley *vs*. Lord Clinton, reported in 2 Jacob and Walker. In that case it is said that 'at all times courts of equity have upon general principles of their own, even where there was no statutable bar, refused relief to stale demands where the party has slept upon his right, and acquiesced for a great length of time.'" Miller *vs*. McIntyre, 6 Pet., 61.

"The established doctrine—or as Lord Redesdale phrased it, in *Hovenden vs Annersley*, (2 Sch. & Lef. 637, 638), 'the law of courts of equity'—from its being a rule adopted by those courts independently of any positive legislative limitations, is that it will not entertain stale demands. Lord Camden, in *Smith vs*.

Clay, (3 Brown Ch. R., 640, note), stated it in a very pointed manner. 'A court of equity,' said he, 'which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation of suits in this court.'" Piatt *vs.* Vattier, 9 Pet., 405, citing many other authorities, English and American.

Another recognition and illustration of the rule is afforded by the case of McKnight *vs.* Taylor, 1 How., 161. In this case, Taylor, to whom certain real property had been conveyed in trust to sell the same to pay certain creditors of the grantor if, after a specified date, their debts remained unpaid, filed a bill nineteen years and three months afterward for the aid of the court in effecting sale, the legal title being outstanding, and the Circuit Court decreed such sale accordingly. The Supreme Court, in an opinion by Chief Justice Taney, reversing the decree, say: "No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant * * * *. If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment "upon any presumption of payment, *for it is not merely on the presumption of payment, or in analogy to the statute of limitation that a court of chancery refuses to lend its aid to state demands.* There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court."

Can it be said that sharing with his father the money of Casilear, borrowed upon this very property, for six years, and deferring suit twelve years, until action to recover it would be impossible, as, also, until time has obscured the facts and removed by death the only parties charged with either fraud or irregularity, is either conscience, good faith or reasonable diligence?

The opinion in the case last cited, continues: "In matters of account, where they are *not* barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from consideration of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in *Piatt vs. Vattier*, (9 Pet., 416), and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence."

From the first clause of the paragraph last quoted, it was argued below that the rule laid down is one applicable to cases of account only.

But the only question of account, *or of fact*, presented in McKnight *vs.* Taylor was, whether a debt of a fixed amount, set out in the schedule accompanying a deed of trust, remained unpaid. In the case at bar, the court is invited to inquire and determine, upon parol testimony, whether promissory notes given nineteen years ago, and secured by deeds of trust reciting that they represent an actual indebtedness, were not in fact given without any consideration, and without the existence of any indebtedness between the parties; whether an alleged copy of the advertisement of a sale made twelve years before Bill filed is a genuine copy, and, if so, whether it is a copy of the only advertisement of the said sale, or only of a supplementary advertisement in some other paper from that containing the regular advertisement, inserted for the sake of greater publicity; whether a purchaser at a sale made twelve years ago was a purchaser in good faith, or the mere agent or a deceased trustee, now charged with seeking to obtain the property for himself by fraud; whether two successive purchasers of the property, the last purchase being eleven years before Bill filed, took with or without notice of the alleged irregularities; whether such irregularities, if they ever existed, were or were not ratified, waived or acquiesced in by the complainant in the six years of reconciliation which immediately followed them, and the five years of further inaction which supervened before suit brought; what rents, issues and profits the property has yielded for the past eleven years, and what have been the expenditures for improvements and repairs during that period, with a number of other questions of similar difficulty. Surely the reasoning of the opinion is as applicable to these varied and complicated inquiries as to the single and simple question in McKnight *vs.* Taylor. Nor is there anything in the opinion to intimate that the rule is restricted to cases of account.

"The counsel for the complainants have argued that a court of equity can never give effect to the lapse of time, except in a case where the statute would bar an action at law. That time must always be applied by analogy to the statute; and that this analogy would be destroyed, if equity should give a greater effect to time, than could be given to it under the statute.* * * *. That statutes of limitation are binding on a court of equity, as they are on a court of law, is undoubted. In these cases equity may be said to follow the law. But there are many cases in which lapse of time will constitute a bar in equity, though at law the statute would not bar. * * * *. 'In such cases courts of equity act sometimes by analogy to the law; and sometimes upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in pursuing rights, or long and unreasonable acquiescence in the assertion of adverse rights. * * * *. Where the statute applies, it is binding on a court of equity, but in cases where the statute does not apply, the court acts upon its own principles.'" Lewis *vs.* Baird, 3 McL., pp. 82-3.

It was further objected below, however, that as the demurrer admits the facts alleged, the effect of lapse of time in rendering the original transactions obscure and dissipating the evidence to disprove them, cannot be considered on demurrer.

If the admission of facts by demurrer were not a concession *pro hac vice* only, which, if the demurrer is overruled, immediately disappears, leaving the same necessity of proof as if no demurrer had been interposed, this objection would be more plausible than it is. The question, however, is removed from the field of discussion by the Supreme Court of the United States, which, in Maxwell *vs.* Kennedy, 8 How., 210, and in Lansdale *vs.* Smith, 106 U. S., 391, expressly decide that the objection of laches may be raised by demurrer, and which in Sullivan *vs.* Portland R. R. Co., 94 U. S., 806, and Leavenworth Cor. *vs.* Chicago etc. R. R. Co., 18 Fed. R., 209, decided that, though not raised at all by the pleadings, the court would, *sua sponte*, take notice of the objection and dismiss the bill.

So in Godden *vs.* Kimmell, 99 U. S., 201, which was a bill filed by a beneficiary under a deed of trust made by a partner to reach alleged real estate of the firm, the legal title to which had been vested in the other partner, the court held a delay of fourteen years fatal. "Stale claims are never favored in equity, and where gross laches is shown and unexplained acquiescence in the operation of an adverse right, courts of equity frequently treat the lapse of time, even for a shorter period than the one specified in the Statute of Limitations, as a presumptive bar to the claim. *Stearns vs. Page*, 7 How., 819; *Badger vs. Badger*, 2 Cliff. 154 * * * *. Fourteen years elapsed from the date of the deed to the filing of the bill, and throughout that period none of the complainants during the lifetime of the partners and trustee or any of them, took any steps whatever to ascertain or enforce their rights, if any they had, under that trust deed * * * *. Lapse of time, said Mr Justice Thompson, and the death of the parties to the deed, have always been considered in a court of chancery entitled to great weight and almost controlling circumstances in cases where the controversy grows out of stale transactions. *Jenkins vs. Pye*, 12 Pet., 241. * * *. Limitations of the kind are dictated by experience and are founded on a satisfactory policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof. *Brown vs. County of Buena Vista*, 95 U. S., 161. Difficulties often arise in controversies of the kind in getting at the truth so as to administer justice with anything like resonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the case, and it is not improbable that many or all of their clerks and agents may be inaccessable as witnesses, for the same or other reason, or if alive and their attendance as witness may he secured, they may not be able to remember anything about the transaction. Viewed in the light of these authorities and suggestions, the court is of the opinion that the last defense set up in the respondent's answer [laches] is fully maintained, and that there is no error in the record."

Jenkins *vs.* Pye, 12 Pet., 241, was a bill to set aside an alleged conveyance from a daughter to her father, alleged to have been obtained without consideration and by the exercise of undue paternal authority, the Bill not being filed until eighteen years after date of the deed, and both grantor and grantee having died in the meantime. The daughter died seven years after the date of the deed, and her heirs were infants until suit brought; *held*, nevertheless, barred by lapse of time.

Brown *vs.* County of Buena Vista, 95 U. S., 157, was a bill to enjoin a judgment at law procured by the fraud and conspiracy of the plaintiffs and the county officers, filed eight years after recovery of the judgment. The court says: "The Statute of Limitations of Iowa of five years, prehaps, does not apply, because the fraud, if it existed, was not known sufficiently early. The statute could only run from the time of the discovery. But a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court. *Sullivan vs. Portland & Kennebec Railroad Co.*, 94 U. S., 806."

So in Harwood *vs.* Railroad Co., 17 Wall., 78, which was a Bill by stockholders to set aside a foreclosure sale of a railroad worth two million dollars for twenty-five thousand dollars, filed five years after the sale, alleging it to have been procured by collusion and in fraud of the original stockholders, the court said: "We are of opinion, also, that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the Bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen."

In the case at bar, ignorance is not only not claimed, but, for at least for eleven years before suit brought, is expressly negatived; and the only excuse for delay offered is that the complainant has been "engaged in negotiations from time to time," not alleged to have been continuous, nor to have been entertained, even, by the defendant, which the complainant, nevertheless, "has hoped would result in a settlement and adjustment of their differences in regard to the property held by him."

So, where mining stocks left with a bank as collateral security for a loan, were, with complainant's knowledge, bought at private sale from the bank by three of the directors, and the complainant's Bill to redeem was not filed until nearly four years afterwards, the court said: "Courts of equity often treat a lapse of time less than that prescribed by the Statute of Limitations as a presumptive bar, on the ground of 'discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.' * * * *. No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He must be deemed to have made a final election not to disturb the sale of 1868; and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity." Hayward *vs.* National Bank, 96 U. S., 611.

The "circumstances" referred to, in the above extract from the opinion, were merely a large advance in the value of the stock. In addition to the marked increased of values in real estate in this city during the eleven years preceding the filing of the Bill, of which the court will take judicial cognizance, we have in the case at bar the loss of material evidence by the death of the parties charged with the alleged fraud and irregularities, the loss of opportunity to recover by action the three thousand dollars loaned to complainant's father, which reasonably prompt action by him would have afforded, the difficulty of accurately or sufficiently recalling the amount of rents and items of expenditure during this long period, the effect of the lapse of time upon the accessibility of witnesses, and their memories where still accessible, referred to by the court in Godden *vs.* Kimmell, together with a number of other circumstances of greater or less materiality which were not present in Hayward *vs.* National Bank.

"There is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. * * * *. Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions. * * * *. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others and cannot be excused *but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.* Wagner *vs* Baird, 7 How., p. 258.

No such hindrance or impediment, fraud or concealment is, or can be, claimed to have existed in the case at bar.

So, in Murphy *vs.* Paynter, 1 Dill., 333, which was a bill filed to set aside a deed alleged to have been obtained by duress twelve years before, the court, admitting that the complainant would probably have been entitled to the relief asked if sought within a reasonably early time after the date of the deed, denied it upon the ground of laches, the property which had been enhanced in value and improved, remaining, nevertheless, in the same grantee, and although continued apprehension of personal danger was the cause assigned for the delay.

See, also, Hunt *vs* Ellison, 32 Ala., 173; Hamlin *vs.* Mebane, 1 Jones Eq., 18; Sullivan *vs.* Portland R. R., 4 Cliff., 212; Wilson *vs.* Anthony, 19 Ark.. 6; Graham *vs.* Boston R. R., 14 Fed. R., 753; Spiedell *vs.* Henrici, 15 Fed. R., 753; Ferson *vs.* Sanger, 1 Davis, 252.

Roberts *vs.* Tunstall, 4 Hare, 262, and the authorities there collected, under a state of facts substantially similar to those alleged in the case at bar, show that the rule here relied upon is neither recent nor confined to the American courts. But the decisions of this court are so numerous and pertinent that it is thought unnecessary to cite others.

That in the recent case of Richards *vs.* Mackall, 124

U. S., 183; to which the present appellant was a party, is, of itself, conclusive.

The decree below, it is repectfully submitted, should be affirmed.

J. J. Darlington,
Solicitor for Defendants Casilear.

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JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

BROOKE MACKALL, APPELLANT,
v.
GEORGE W. CASILEAR ET AL.
No. 97.

Appeal from the Supreme Court of the District of Columbia.

Brief of S. S. Henkle, Counsel for Devisees of Brooke Mackall, Sr., Appellees.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

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Appeal from the Supreme Court of the District of Columbia.

Brief of S. S. Henkle, Counsel for Devisees of Brooke Mackall, Sr., Appellees.

STATEMENT OF THE CASE.

This is the sequel to the case of Mackall *v.* Mackall, decided in this Court at the last term.

The facts as they appear on the face of the bill and exhibits are that Brooke Mackall, Sr., in February, 1880, made a deed to the appellant of all the property described in the bill, and died a few days thereafter. Shortly before making this deed he made a will, by which he devised all his property to his other children.

After his death the devisees under the will filed a bill to set aside this deed of February, 1880. The appellant here—the defendant in that case—answered, defending the deed, and also setting up title independent of this deed to all the property embraced in the deed, and claiming that the deed was but a affirmation of his title.

Upon hearing in the court below the deed of February, 1880, was held to be a confirmation of Brooke's title to lot No. 7, square 223, Washington, and declaring the deed null and void and vacating it as to all the rest of the property.

This Court at the last term affirmed that decree.

The bill in this case was filed after the final decree in the other case in the court below.

By this bill the appellant sought to reassert the same title to a part of the lots which had been adjudged against him in the other case, viz., the Pairo deed, found on p. 7, Rec.

It will be seen by this exhibit that Brooke Mackall, Sr., in 1863, was indebted to one Gasper Cope, and to secure his indebtedness he conveyed, by deed of trust to Charles W. Pairo, certain lots in the city of Washington. The deed recites that the indebtedness has been paid, and that Brooke Mackall is entitled to are conveyance, discharged of the trust, and that he had requested that the reconveyance be made to Brooke, Jr., and the deed is accordingly so made.

In the other case Brooke, Jr., set up this deed and relied upon it as evidence of title to these lots, but the court below decided against him, and this Court affirmed the decree.

By this bill (par. 3, p. 2, Rec.) it appears that in May, 1866, Brooke, Jr., executed to his father certain notes and secured them by deed of trust upon certain of the lots in the Pairo deed. The deed was made to his father as trustee and was acknowledged before him as notary public.

He sets up that there was no consideration for the notes, but that they were made to enable his father to borrow money for their joint benefit. That no money was ever borrowed, but that his father afterwards, a variance occurring between them, advertised, sold, and conveyed the lots to Joseph B. Hill for the nominal consideration of $2,000, but that no money was, in fact, paid.

The complainant says "that by reason of the premises said deed to J. B. Hill was void and of no effect, and that all subsequent conveyances depending thereupon are void and of no effect as to complainant."

It will be noted that it is not claimed that the trust deed made by complainant to his father was void, or even voidable, but only that the deed from the trustee to Hill was void.

ARGUMENT.

While the demurrer *pro hac vice* admits the facts when well pleaded to be true, it does not admit the legal conclusions, and I deny that all or any of the facts stated would render the deed to Hill void.

Let us examine the facts stated—

1. The deed was made to Brooke Mackall to secure two notes made payable to his order.

That is, Brooke made a deed to his father as trustee to secure notes payable to his order.

If they chose to make the father the trustee for both, certainly they had a right to do so.

A mortgage is always made by the debtor to the creditor, and a deed of trust differs from a mortgage only in that the deed is ordinarily made to a third person and contains a power of sale by the trustee in case of default in payment. But there can be no lawful objection to the creditor acting as his own and the debtor's trustee, if the parties so elect. At all events the party who wittingly makes such a deed is estopped from denying its validity.

2d. The grantor acknowledged the deed before the grantee as notary public.

This might be irregular, but as between the parties and their privies would not be ground for invalidating the deed, much less render it void.

The acknowledgment is not essential to the validity of the deed at all. Our statute requires a deed to be acknowledged to entitle it to admission to record, but *inter partes* a deed is good without acknowledgment. Moreover, it is not charged that the acknowledgement was not voluntarily and understandingly made, and Brooke would be estopped from denying its validity, if that was essential.

3d. The notes were given to enable his father to borrow money for the benefit of both of them, and it was not intended that any claim should ever be set up against the complainant upon said notes, or either of them, and there was no default in the payment of them.

It is not pretended that any personal demand has ever been made upon Brooke for the payment of the notes.

It is apparent that Brooke recognized the equitable right of his father to have this property used to raise money for his own support, and these notes and deed of trust were to be used for that purpose.

THE PAIRO DEED.

Brooke's claim of title is based upon the "Pairo" deed (Exhibit A, p. 7 Rec.), which is in fact but a deed of release of a deed of trust which Mackall, Sen., had made to

Pairo as trustee, to secure an indebtedness to one Gasper Cope. The debt was paid, and Mackall, Sen., was entitled to have the legal title reconveyed to him as the equity was in him. Instead of taking the release in his own name for some reason he allowed the deed of release to be made in the name of Brooke, but it is not asserted or pretended that Brooke paid anything for it, and he held it simply for his father. When he says that the money was to be used for their joint benefit, he doubtless tells the truth, for he lived a life of idleness and was supported entirely from his father's property.

Then he charges that seven years afterwards his father caused the property to be advertised and sold on this deed, and Joseph B. Hill became the nominal purchaser for $2,000, but that he paid no money, and that he was really buying it for Mackall, Sen. It was a scheme of Mackall, Sen., to divest complainant of his property and to obtain it himself without paying anything for it.

Conceding these facts to be true the father was entirely justified in using this deed of trust to get his title back into himself that he might be able to use his own property for his own benefit.

Now that is all there is of it, as this Court well knows.

Irregularities.

It is charged that the sale was irregular because the notice of sale was published but three days, and the deed of trust required publication of sixty days.

The Court will see by reference to the deed of trust on p. 10, Rec., that it did not designate any length of time for the publication. The language of the deed is, "first giving sixty ——; notice of the time, place, and terms of sale." The blank might be supplied by "minutes," "hours," "months," but the law will not supply it, and as it stands no length of time was designated. The place and terms were all matters of discretion for the trustee.

But it is charged that Mackall, Sen., was the real purchaser at his own sale; Hill being used simply that it might not appear that he was buying himself.

Ordinarily, where a trustee buys at his own sale, it would be voidable at the option of the debtor, but it is not *ipso facto* void. There is no doubt, however, that the party secured by the deed may buy at the sale, and the fact that he is the trustee selected by both parties would not deprive him of his right to buy, unless it be shown that he took advantage of his position of trustee to buy the property for less than its value, and this is not pretended.

The deed was made to Hill June 26, 1873, during a variance between the father and son, as the bill asserts.

Paragraphs 4, 5, and 6 of the bill, set forth a similar history by which certain other of the Pairo lots were conveyed by the appellant to a trustee, Louis Brand, to secure a note to Mackall, Sr., for $2,000.00, but which he says was an accommodation note made to raise money for their common benefit, but no money was ever raised, and there was no consideration for the note. Mackall, Sr., afterwards caused the property to be advertised and sold by the trustee, and Hill became the nominal purchaser for $2,000.00, but paid no money. He bought for Mackall, Sr.

No irregularities are claimed here, except that the sale was only advertised three days. The same observations submitted with regard to the former sale are applicable to this.

The deed was certainly not void.

THE TWO HILL DEEDS ONLY ATTACKED.

The prayer of the bill is that the two deeds of B. Mackall, trustee, and Louis Brand, trustee, to Joseph B. Hill be decreed to be null and void, and that all deeds and written instruments and claims of title derived through them be also decreed null and void. It will be observed that the bill nowhere charges that the original deeds of trust made by Brooke to his father, being Ex. B, p. 9, Rec., and the deed of trust from Brooke to Louis Brand, trustee, being Ex. F, p. 15, Rec., are void or voidable, and are therefore conceded to be valid deeds of trust, and he does not seek by this proceeding to call them in question.

COMPLAINANT RATIFIED.

But supposing that there were irregularities which would have enabled the plaintiff to have had the deed to Hill set aside, the plaintiff ratified and acquiesced in it, and was bound by it. He says in par. 11, p. 6: "That soon after the execution of the deeds made in 1874, the said B. Mackall, Sr., became reconciled to complainant, they living together, and sharing the benefit of all property possessed by each in common. He said B. Mackall, Sr., constantly assuring complainant that he would rectify all that was wrong in said conveyances to the best of his ability, which assurance was relied upon by complainant, and was *satisfactory* to him."

So that any infirmities in the deeds, if there were any, were waived, and complainant was content to rely upon the assurances of his father that he would rectify any wrong that was done him, and with this assurance he was *satisfied.*

He then goes on to say, that in Feby., 1880, his father made him a deed of all his interests in said property which was *entirely satisfactory to complainant.*

THE DEED OF FEB'Y, 1880, HEALED ALL INFIRMITIES.

This deed was accepted by the complainant and relied upon as his title to said lots.

If there had been any infirmity in the trust deeds or in the advertisements, or a want of consideration for the notes, they were all waived and healed by the acceptance of this deed from his father.

He could have gotten no more if he had had a decree in equity against his father requiring him to convey to him.

If he was entitled to have restored to him all that his father got by the schemes, which Brooke says he resorted to get Brooke's titles into himself without paying anything for them, it was all fully accomplished by the deed of February, 1880.

So that the learned gentlemen have wasted their labor on the elaborate argument submitted in their brief to show that these deeds of 1874 were void and that Mackall, Sr., got no title by them.

The complainant in the same paragraph says that this reconveyance of his father to him was attacked by his brothers and sisters, and a decree was made adjudging the same to be void as to the property herein claimed by the complainant, from which decree, however, they claim to have taken an appeal to the Supreme Court of the United States, &c.

> "While such litigation was pending, however, there was, as believed by complainant, no propriety in bringing suit *to enforce what he claimed to have been sufficiently performed by the execution of the deed of his said father's to him of February* 28, 1880, and such litigation was pending at a very recent date."

THE TITLE TO THE PROPERTY DECREED TO DEFENDANTS.

Our first ground of demurrer is, *that the title to the property described in the bill has been adjudged and decreed to be in these defendants*, although the decree setting aside Brooke's deed of February, 1880, did not in terms vest the title in the devisees of Brooke Mackall, Sr.; that was the necessary legal effect of it.

The deed of February, 1880, was set aside in their suit and in their behalf and for their benefit. Whether the effect of the decree was to vest title in the devisees of the father or not, it destroyed any pretence of title that Brooke had.

The presumption is that the decree was made after a full hearing upon the merits, and that the appellant set up all the claims to title, legal and equitable, that he had, and this is the fact as the Court knows.

If the court had found that appellant had a good title in equity to said lots, they would have decreed that said deed should stand as a confirmation of his title, as they did as to lot No. 7, sq. 223, in the same decree.

The title, both legal and equitable, to the lots described in the bill, has been decreed against the appellant in a former suit, and that decree was affirmed in this Court at the last term.

This bill is but an attempt to litigate over titles which were litigated and settled by the former suit. This would seem to be an end of the case.

CLOUD.

The bill is filed to have the two deeds of Mackall, Sen., to Hill, and of Brand, trustee, to Hill, which complainanant says are fraudulent and void, and cloud his title set aside and vacated, as well as all subsequent conveyances founded on them.

But, as we have seen, the bill leaves the two trust deeds made by Brooke—one to his father and the other to Brand—standing and intact, and apparently valid.

While these deeds stand the complainant has no title to be clouded.

This is distinctively a bill to remove a cloud from the complainant's title.

Such a bill is a bill of peace, and can only be brought by a party *in possession* and having a *clear*, *legal*, and *equitable title.*

Said this Court in Orson *v.* Smith (18 How. 265):

> "Those only who have a clear, legal, and equitable title connected with the possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title."

> "Nor can the amendment be sustained upon the doctrine of bills *quia timet.* The complainants have not the legal right, and are not in possession, which we take to be essential facts in such cases."
>
> Crook and Wife *v.* Brown, 11 Md. at 173.

> "We think the circuit court was in error on the question of jurisdiction. The proceeding is in the nature of a bill *quia timet*, or bill of peace."

The rule governing the jurisdiction of courts of equity in cases of this kind is thus stated by the Supreme Court in Orson *v.* Smith, 18 How. 263:

> "Those only who have a clear, legal, and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. Such suits are instituted

to protect a party who is in possession and has a clear title, against vexatious litigation by persons setting up unjust and illegal pretensions, and the ground of equity jurisdiction is that being in possession he cannot have a remedy at law. In the present case, the appellee was not in possession, and the only object of the suit is to try the question of right and to obtain the possession. Such a proceeding is not within the province and jurisdiction of a court of chancery."

Polk *v.* Pendleton, 31 Md. at 124–5.

I have cited these cases because they show what the doctrine of this Court is, as well as that of the courts of Maryland, from which we derive our jurisprudence.

I might cite many cases from other States to the same effect. In some of the States, however, the equity jurisdiction is controlled by legislation.

THE BILL IS MULTIFARIOUS.

"Multifariousness, properly speaking, is where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest nor connection with some of the distinct matters for which the suit is brought."

Newland *v.* Rogers, 3 Barb. Chy. p. 432.
Swift *v.* Eckford, 6 Paige, 28.
Boyd *v.* Hoyt, 5 Paige, 79.
Richards *v.* Pierce, 52 Me. 562.
Kenebeck & Portland R.R. *v.* Portland & K. R.R., 54 Me. 182.
West *v.* Randall, 2 Mas. at 201.
Metcalf *et al.* *v.* Cady *et al.*, 8 Allen, 588.
Crew *v.* Fairchilds *et al.* 1 McCarter, 76.
Emons *v.* Emons, Ibid. 114.

In Fellows *v.* Fellows, 7 Cow. at 700, the Court says:

"But notwithstanding the disposition of a court of equity to prevent a multiplication of suits, it will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, *nor one plaintiff to demand several matters of different natures against several defendants;* and the reason of this rule is said to be that such a proceeding would tend to load each defendant with an unnecessary burthen of cost by swelling the proceedings with the statements of several claims against the other defendants with which he has no connection, and also to prevent confusion and to preserve some analogy to the comparative simplicity of a declaration at common law."

In August, 1873, Brooke Mackall, Sen., borrowed from one F. A. Casilear $3,000.00 and gave his note for it payable one year after date.

To secure this note Hill, Mackall's trustee, executed the deed of trust found p. 20, Rec., to John C. McKelden and Edward McB. Timony, trustees. The note was not paid and the trustees on the 23d of October, 1874, sold and conveyed a part of the property described in said trust deed to George W. Casilear. (See deed to Casilear, p. 26, Rec.)

He has, ever since, held and possessed the lots covered by his deed.

My clients, the devisees of Brooke Mackall, Sr., make no claim of title to these lots, and Casilear makes no claim and has no manner of interest in any of the other property described in the bill.

The Court will see that George W. Casilear, the purchaser, who is sued, is not F. A. Casilear, who loaned the money.

Casilear has no manner of interest in defending our title and we have no interest in defending his. True, his title came through Hill and so did ours; there they fork off. Hill conveyed the Casilear lots to McKelden and

McTimoney in trust to secure Casilear, and he conveyed the lots which we claim to Leonard Mackall in trust for his father, and the father devised them to us, and this Court has decreed them to us.

I submit that the bill is clearly multifarious in joining parties who have no common interest.

Hill is a Necessary Party.

The prayer of the bill is that the two deeds from B. Mackall, trustee, and from Louis Brand, trustee, to Joseph B. Hill be adjudged and decreed to be null and void and of no effect, and that all deeds and instruments deriving title through them be decreed to be void.

The bill is to set aside the Hill deeds, and the deeds dependent on them.

Hill is living in this city and yet he is not made a party at all.

Upon what possible theory the complainant expected to attack Hill for fraud and set aside his solemn deeds without even notifying him that he was attacked, I am too obtuse to see.

This is playing Hamlet without Hamlet. Certainly this is a *fatal* defect.

McKelden and McTimoney Necessary Parties.

Again, Casilear derives title through the deed made to him by McKelden and McTimoney. It would seem as their deed is sought to be set aside that they were *necessary parties*, but they are not sued at all, and yet the Court is invited to pass upon and set aside their deed. Certainly they should be notified to defend it.

LACHES.

So far as my clients are concerned, I should much prefer that the Court would decide the case upon the *vital* points made in this brief, touching the merits of the case, than upon the laches of the complainant in bringing his suit. Of course I waive nothing upon this ground, but I think the Court will not have occasion to consider it. In case, however, I am mistaken about this, I submit my branch of the case upon the question of laches upon the able brief of my learned friend, Mr. Darlington, for the appellee, Casilear.

I can see no distinction between laches as applicable to my clients and Casilear.

THE MORALE OF THE CASE.

In the case of Mackall *against* Mackall, decided at the last term of this Court, Brooke posed as the affectionate, filial, trusted, and beloved son and friend of his old father, and satisfied the Court that on his death-bed the father's heart went out to him, and he made the deed of February, 1880, giving him all his property, to the exclusion of all his other children, to undo the wrong he had done him but a short while before he was taken sick, in making his last will cutting him off with a dollar. That case was decided, and now he throws off the mask and tells the Court that when his poor old father was trying to get back into his own control some of the property that he had weakly permitted Brooke to get into his name, that he was doing it by the use of schemes to defraud him out of his property, and his counsel, on page 28, say :

" In this case the bill alleges *actual, active, and intense fraud*, on the part of the father as against the son, in converting the trust created by Exhibit B to his own private gain, and to purposes foreign to the objects of its making."

The fact is that by this proceeding Brooke is seeking to get rid of that part of the decree of this Court, in Mackall *v.* Mackall, by which these lots, and some others of small value and almost eaten up by taxes, were given to his brothers and sisters, and to add them to the large property worth at least $300,000 which he got by the same decree.

S. S. HENKLE,
Counsel for devisees of Brooke Mackall, Sen.